80-1397

No. .....

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# In the Supreme Court of the United States

**October Term, 1980**

RONALD CARABBIA,

and,

PASQUALE CISTERNINO,

*Petitioners,*

vs.

STATE OF OHIO,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI

**To the Eighth District Court of Appeals**
**For Cuyahoga County, Ohio**

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## QUESTIONS PRESENTED

I. Whether due process and fair trial rights are violated by the admission of eyewitness testimony that was clearly the product of unnecessary and impermissibly suggestive photographic confrontations that were unilaterally conducted *during trial* by the prosecutor and where, in addition to severely restricting defense cross-examination designed to show the totality of the circumstances, the trial court refuses to give a specific instruction on identification evidence?

II. Whether an accused is denied a fair trial and due process of law where the trial court arbitrarily and unreasonably restricts cross-examination of key investigative witnesses and prohibits the accused from eliciting exculpatory evidence material to the issue of guilt or punishment?

III. Whether an accused is denied a fair trial and due process of law where the trial court refuses to order a suppression hearing and compel production of subpoenaed witnesses to determine the admissibility of evidence obtained or derivatively obtained through a facially defective warrant affidavit, especially when the affidavit was:

(1) used to arrest the accused and was relied upon by the trial court in denying bail;

(2) relied upon by the State in returning its indictment against the accused;

(3) relied upon by the trial court as a basis for joining those accused with co-defendants for trial in a capital case; and where

(4) it was represented by the State to be its "theory of prosecution" and relied upon by the accused as a bill of particulars?

IV. Whether the introduction of evidence derived from searches and seizures which were violative of Fourth, Fifth, and Fourteenth Amendment rights, requires reversal of the defendants' conviction?

V. Whether an accused is denied a fair trial with due process of law where the State's prosecutor willfully, and with the express approval of the trial judge:

(1) makes a highly emotional argument punctuated by personal references specifically calculated to stir up racially prejudicial attitudes and otherwise appeal to popular ethnic stereotypes;

(2) informs the jury that he, the State prosecutor, and all of the Federal and local investigators in the case, knew as a fact (based on facts outside the Record) those on trial were not only guilty of the specific charges being tried, but other serious charges as well—including, but not limited to, murders and the bribery of judges and prosecutors;

(3) argued that the various defense attorneys involved in the case were likewise convinced their own clients were guilty; and

(4) commits numerous other acts of professional misconduct in violation of his ethical duties and high responsibilities?

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Due process and fair trial rights are violated by the admission of eyewitness testimony that was clearly the product of unnecessary and impermissibly suggestive photographic confrontations that were unilaterally conducted *during trial* by the prosecutor and where, in addition to severely restricting defense cross-examination designed to show the totality of the circumstances, the trial court refused to give a specific instruction on identification evidence 6

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An accused is denied a fair trial and due process of law where the trial court refuses to order a suppression hearing and compel production of subpoenaed witnesses to determine the admissibility of evidence obtained or derivatively obtained through a facially defective warrant affidavit, especially when the affidavit was:

(1) used to arrest the accused and was relied upon by the trial court in denying bail;

(2) relied upon by the State in returning its indictment against the accused;

(3) relied upon by the trial court as a basis for joining those accused with co-defendants for trial in a capital case;

(4) represented by the State to be its "theory of prosecution" and relied upon by the accused as a bill of particulars ..... 28

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An accused is denied a fair trial with due process of law where the State's prosecutor willfully, and with the express approval of the trial judge:

(1) makes a highly emotional argument, punctuated by personal references, specifically calculated to stir up racially prejudicial attitudes and otherwise appeal to popular ethnic stereotypes;

(2) informs the jury that he, the State prosecutor, and all of the Federal and local investigators in the case, knew as a fact (based on facts outside the Record) those on trial were not only guilty of the specific charges being tried, but other serious charges as well—including, but not limited to, murders and the bribery of judges and prosecutors;

(3) argues that the various defense attorneys involved in the case were likewise convinced their own clients were guilty; and

(4) commits numerous other acts of professional misconduct in violation of his ethical duties and high responsibilities ..... 35

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## PETITION FOR WRIT OF CERTIORARI
**To the Eighth District Court of Appeals**
**For Cuyahoga County, Ohio**

*To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:*

The petitioners, Ronald Carabbia and Pasquale Cisternino, pray that a writ of certiorari issue to review the judgment of the Ohio Court of Appeals, which judgment became final on December 4, 1980; when the Supreme Court of Ohio denied further appellate review.

## OPINIONS OF THE COURTS BELOW

The judgment entries by the Supreme Court of Ohio denying further review are set forth at Appendices "A" and "B", pp. A1 and A2 in the Appendix to this Petition.

The Journal Entry of the Ohio Court of Appeals, the judgment to which this petition is directed, is designated Appendix "H", p. A32.

## STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of Ohio was entered on December 4, 1980. The jurisdiction of this Court is invoked under Title 28 U.S.C. §1257(3).

## CONSTITUTIONAL AND STATUTORY PROVISIONS WHICH THE CASE INVOLVES

The relevant constitutional and statutory provisions involved herein are set forth as Appendix "M", p. A176.

## STATEMENT OF THE CASE[1]

As specifically determined by the Court of Appeals in a statement we adopt not because of its accuracy, but rather, because it does synthesize certain salient facts:

> "On December 5, 1977, . . . Ronald Carabbia and Pasquale Cisternino were named as defendants in a five-count indictment. Named as co-defendants were James Licavoli (aka Jack White), John Calandra, Angelo Lonardo, Alfred Calabrese, Thomas Sinito, Raymond Ferritto and James Fratianno. The indictment alleged that the defendants had conspired to murder and did murder Daniel J. Greene on October 6, 1977, by aggravated arson and for hire in furtherance of an organized crime venture, in violation of R.C. §§2903.01, 2909.02, 2923.01 and 2923.04. Defendants Ferritto and Fratianno entered guilty pleas; Calandra's case was severed for health reasons. The two conspiracy counts were nolled by the State.

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1. Whenever reference is made in this petition to a page in the Record in the trial court, it will be preceded by the prefix "R". References to the Appendix to this petition, filed under separate cover, are noted as "App. ....."

The trial of the case against the remaining six defendants commenced on March 29, 1978, following more than a month of jury selection and motion hearings, on charges of aggravated arson, aggravated murder and engaging in organized crime against all six. Defendant Calabrese's motion for judgment of acquittal was granted following the presentation of the State's case. The jury returned verdicts on May 25, 1978. . . Carabbia and Cisternino were found not guilty of engaging in organized crime and the aggravated murder specification of murder for hire, but guilty of aggravated arson in violation of R.C. §2909.02 and guilty of aggravated murder with the specification of aggravated arson in violation of R.C. §2903.01. Verdicts of not guilty were returned as to all the counts against defendants Licavoli, Lonardo and Sinito.

* * * * *

Daniel J. Greene died as a result of injuries sustained when a bomb placed in a car parked next to his vehicle exploded.

* * * * *

Debbie and Gregory Spoth were driving east on Cedar Road, about to turn north (left) onto Brainard Road. Directly across from them in the opposite westbound lane, they observed a 1973 or 1974 blue Plymouth rolling to the corner, also about to turn north (right) onto Brainard Road. There were two men in the Plymouth, the passenger sitting in the back seat. The driver was in his forties, had salt and pepper colored hair, and was not a large man; Mrs. Spoth recalled that he had a thin face and looked Italian. The man in the back seat was larger, heavier set, dark complexioned, with a receding hairline and, according to Mrs. Spoth, also looked Italian. The Plymouth hesitated in executing the turn onto Brain-

ard so Mrs. Spoth turned left onto Brainard first and the Plymouth followed. Almost immediately after turning, the explosion occurred at Brainard Place to the Spoths' right and Mrs. Spoth momentarily stopped the car. With debris flying toward her car, she then moved ahead. As the blue Plymouth passed her, the occupants faced the Spoths and looked toward the direction of the explosion." (App. A32 to A36.)

## ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

In this case, at least as to Ronald Carabbia, the most significant issues involve: (1) his identification by Debbie Spoth as the man in the back seat of the car—that is, as the man who detonated the bomb that killed Danny Greene; and, (2) the abusive arguments made by the prosecutor.

Pasquale Cisternino likewise contends he was victimized: (1) by the prosecutor's summation; (2) by the rulings denying his motions to suppress illegally seized evidence; and (3) he contends that, to the extent he could only be convicted *under the charge given the jury* if Carabbia was convicted first, he necessarily would be a beneficiary if the Court credits Carabbia's identification arguments.

Here the Opinion below, in dealing with the identification issues, is flawed almost beyond belief. This thought is punctuated, in our judgment, by the court's flagrant *unwillingness* to recognize that the overriding issue in this appeal was whether those on trial had a fair trial as distinguished from whether the trial judge and the prosecutor could be excused for the wrongs committed by them—wrongs that virtually insured somebody would be convicted.

Under Section VII of its Opinion, where we are told the "record does not support the implication that [prosecu-

tor] Marino made any suggestion that Carabbia was the man in the back seat" (App. A79). Obviously, the court must truly be oblivious to the fact that defense counsel were prevented by the prosecutor and the judge, who endorsed Marino's objections, from developing various lines of inquiry designed to establish a basis for the inference that this is precisely what occurred. Additionally, the court specifically credited defense counsel with having said, at the time, that such questions were "critical as the court would not allow assistant prosecutor Marino to take the stand" (A78).

Simply put then, the Opinion holds that while there were only two people present (a choice willfully made by *the* sort of trial prosecutor who, in his all-out quest for a verdict, would brazenly make the type of unethical charges made by him against all defense counsel in this case), it was proper to deny the defense *any* realistic opportunity to show the identification of a particular defendant corruptly influenced on the one hand, and to punish him for having failed to do so on the other.

As to the Opinion's treatment of the manifestly prejudicial final argument made by the prosecutor, aside from the sheer illogic of its ultimate rationale, petitioners' arguments expose more than a mere perceptible reluctance by the court to sanction a prosecutor for willfully abusing his role as a public servant, especially when it is done in quest of personal glory—the case here. *Cf., United States v. Gleason,* 616 F.2d 2, at 27, fn. 19 (1980), where the court expressed the idea that "scurrilous statements, which indicate a reckless disregard by counsel for the facts in the record exceed the bounds of responsible advocacy in our adversarial system and merit consideration by the Bar Association Grievance Committee for appropriate action."

What, of course, makes the issue here as to the prosecutor's opprobrious, egregious and pervasive mis-

conduct so important is not just limited to the fact that the State courts have simply refused to recognize what was done by the prosecutor resulted in unadulterated and prejudicial unfairness. These courts have actually succumbed to the specious prosecutorial arguments made in defense of such willful misconduct as was occassioned by the summations made emphasizes the extent to which these petitioners have been victimized. In this regard too, it is noteworthy that the prosecutor's arguments below were punctuated by absolutely outlandish assertion that, in any event, "the overall record will bear out the State's contention that both defendants received a fair trial, and that . . . [his] argument was within the bounds of propriety." The fact that this prosecutor would still maintain, as he did, that he really did not do anything wrong shows beyond any doubt that counsel opposite was then, and is now, fully convinced he could do no wrong in this case in the eyes of any Ohio Court.

## I. DUE PROCESS AND FAIR TRIAL RIGHTS ARE VIOLATED BY THE ADMISSION OF EYEWITNESS TESTIMONY THAT WAS CLEARLY THE PRODUCT OF UNNECESSARY AND IMPERMISSIBLY SUGGESTIVE PHOTOGRAPHIC CONFRONTATIONS THAT WERE UNILATERALLY CONDUCTED DURING TRIAL BY THE PROSECUTOR AND WHERE, IN ADDITION TO SEVERELY RESTRICTING DEFENSE CROSS-EXAMINATION DESIGNED TO SHOW THE TOTALITY OF THE CIRCUMSTANCES, THE TRIAL COURT REFUSED TO GIVE A SPECIFIC INSTRUCTION ON IDENTIFICATION EVIDENCE.

As to the specific contention here being made, the Court of Appeals found that the State's procedure in effecting the "eyewitness identification" of Ronald Carab-

bia as the "back seat occupant" with Ferritto at the time of the Greene murder, was "neither extraordinary nor suggestive . . . and that the Record did not reveal that he [prosecutor Marino] encouraged Mrs. Spoth to select the photo of Carabbia over any other" (App. A75).

(1)

Here the Record shows that prior to February 16, 1978, Debbie and Gregory Spoth had repeatedly rejected photographs of Ronald Carabbia as even resembling the person in whose place Carabbia was convicted (R 3111, 3158, 3186, 3191, 3213-14, 3508-16).

Prosecutor Marino, in meeting *alone* with each of the Spoths, only produced mug shots of the various defendants indicted in the Greene bombing. And, he informed the witnesses that the photos were those of suspects involved in the Greene murder (R 3344, 3707). In addition, these witnesses were already aware of the identity of those being prosecuted via various news media reports (R 3504-08). The photos of Licavoli, Lonardo, Fratianno, and Calandra were far too old as they were men in their 70's (R 3709, 3711). Ferritto had previously been identified as the driver (R 3710); whereas, Cisternino had been previously rejected as looking "too young" (R 3110). The same was true of Calabrese and Sinito (R 3709). Thus, the Spoths had only one possible choice from amongst the defendants—that is, Ronald Carabbia (R 3711-12). Predictably, both picked Carabbia as "most resembling" the man in the back seat but indicated they would have to see him in person "to be sure" (R 3276, 3383). It was at this point that various law enforcement officers informed the Spoths that they believed the tentative identifications were correct[2] (R 3615). (If nothing else, the officers' belief

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2. In *United States v. Moskowitz*, 581 F.2d 14, 20 (2d Cir. 1978), the Second Circuit, in rather compelling language, concluded that reinforcing a witness' identification by confirmatory remarks reduces the trustworthiness of any in-court identification.

in this regard verifies our charge that these witnesses were manipulated.)

Defense counsel seasonably motioned the court to exclude all testimony as to these identifications. It was contended this photo display was improper, overly suggestive and was conducted in violation of the right to the presence of counsel (R 3395-3399). Carabbia's defense counsel also requested disclosure of who arranged the February 16, 1978 meeting (R 3342-43); whether Patrolman Volpe or anyone had made suggestions to the witnesses (R 3442); and an examination of prosecutor Marino regarding his influence on the witnesses during presentation of photos on February 16, 1978 (R 3393). The trial court denied each request for disclosure (R 3343, 3492). And, the court would not permit examination of the prosecutor (R 3400).

During *voir dire,* Debbie Spoth testified that she was "almost positive" Carabbia was the man in the back seat of the Plymouth (R 3276). Also during *voir dire*, Gregory Spoth, when asked by the prosecutor if he could identify anyone in the courtroom as matching his description of the back seat occupant, responded, "Yes. One individual resembles him very strongly" (R 3378-79). Gregory Spoth then identified Ralph Sperli, attorney for Cisternino, as the back seat occupant with Ferritto (R 3379).

Significant here, Gregory Spoth's direct testimony before the jury was different from that given during *voir dire.* Spoth, this time, testified to seeing individuals in the courtroom that looked similar to the back seat occupant (R 3565), as opposed to his conclusive prior identification of defense counsel Ralph Sperli as the "one" individual that most resembled the passenger in the car (R 3379).

It was here that the court determined Mr. Spoth's identification evidence on this point to be too speculative, since he could not select one individual, and foreclosed further inquiry (R 3573-74).

(2)

The analysis set forth below demonstrates the identification procedure utilized by the State was grossly prejudicial to Carabbia's fundamental rights to counsel, confrontation and due process of law. This prejudicial denial of rights was equally offensive to Cisternino under the trial court's charge to the jury.[3]

The "totality of the circumstances test," as ultimately construed in *Manson v. Braithwaite,* 432 U.S. 98 (1971), undeniably furnishes the relevant criteria for determining the admissibility of both out-of-court and in-court identifications. An application of this analysis to the "facts" in this Record shows the following:

(*a*) *Opportunity to Observe*

Synthesized, Debbie Spoth's testimony shows that she was driving with her husband as a passenger, when her car made a left turn from Cedar Road in front of the car driven by Ferritto which made a right turn onto the ramp. She saw him "full face and a side view." As specifically put by her, it was "as I turned I saw him" (R 3265). What she saw, even as put by the witness, was "from . . . the shoulders up" (R 3266). This witness added that her view was, at best, only for "a couple of seconds" (R 3315). And, of course, all this took place at a time when there

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3. Specifically, the court instructed the jury as follows:

"If you find the defendant Carabbia not guilty, your verdict, under the evidence of this case, must also be not guilty as to the defendants Cisternino, Lonardo, Sinito and Licavoli." (App. A135)

was no reason to try to remember the occupants of this car (R 3311-3312). When the explosion occurred, the Ferritto car was behind her car (R 3267-69).

Distilled, Debbie Spoth's evidence shows that, at most, she saw two men in a car for a maximum of a few seconds —*once,* when she turned left in front of them and *again* when their car passed her car that had stopped after the explosion (R 3316). Here, her critical testimony shows:

> Q. It would be pretty fair to say that when you turned to your left after being ordered by your husband to move the car, and after the impact of the explosion, you just seemed to recall that this was the same blue car you saw back there at the intersection. Is that correct?
>
> A. Yes.
>
> Q. Sure. In other words, after everything that had happened to you and everything that was going on at that time, *you really didn't have an adequate opportunity to take special notice of anything when you quickly turned to your left and saw the blue car going around you, except for the fact that there were two men in the car?*
>
> A. *Right.*
>
> Q. *Is that a fair and complete and accurate statement?*
>
> A. *Right.* (R 3323 [emphasis added].)

(*b*) *Lapse of Time*

Debbie Spoth's "almost positive" identification of Ronald Carabbia took place approximately 157 days after the critical event. During this period, she passed over the picture of Ronald Carabbia many times. Indeed, during her testimony at one point, she stated none of the photographs shown her prior to February 16 even "resembled

the man I saw in the back seat" (R 3491). And, even on February 16, 1978, when she was given only pictures of those indicted at that time for this crime, the most she could say was that she would have to see Ronald Carabbia, the person they obviously wanted identified, before she could make any identification (R 3576). This, she tells us, was in response to a question by prosecutor Marino as to whether she "recognized" any of the pictures then being shown her (R 3504).

Significant here, in *Manson*, 432 U.S., at 116, this Court emphatically noted: "We do not have here the passage of weeks or months between the crime and the viewing of the photograph." This point becomes even more important in the light of *Neil v. Biggers*, 409 U.S. 188 (1972), where, as here, months intervened, a circumstance that caused this Court to emphasize that such a delay "would be a serious negative factor in most cases" (*Id.*, at 201).

(c) *Degree of Attention*

As to this facet of the test for reliability, the points made above (both as to duration of the asserted view and the lack of any reason to intensify her recollection) apply full strength here.

(d) *Accuracy of Prior Description*

Here we emphasize the descriptions furnished by the Spoths to the police (R 3523-3524), contained the specific indication that the other man in the car with Ferritto (whose age was estimated as being 40 to 45) was "older, glasses or sunglasses, not heavy, receding hair, white male, dark hair." Even more significant, when specifically asked to respond to the precise and unambiguous question: "Can you identify the occupants now?", their unequivocal, indeed categorical, response was: "Driver, yes."

(e) *Level of Certainty*

Any contention that Debbie Spoth indicated a sufficient level of certainty even at the trial itself must surely reckon with the ultimate fact that her original in-court identification (made after having seen many pictures of Carabbia) was only "almost positive" (R 3276). Here, it should be noted that in the midst of the prosecutor's "testimony" given under the guise of final argument (App. A123), he confessed that Debbie Spoth, after saying the identification of Cisternino was "not right," simply stated that "this man [Carabbia, whose picture was in the array] is more like him, but I've got to see him in person."

Under the *Manson-Biggers* test seemingly against the relevant factors, which doubtless includes some consideration as to "the *necessity* of the photographic identification procedure," *Mata v. Sumner,* 611 F.2d 754, at 757 (9th Cir. 1979), *vacated and remanded,* ..... U.S. ..... (1981), is to be weighted the corrupting effect of the suggestive identification itself. See *Manson,* 432 U.S., at 114.

(3)

Here, of course, not only do we have the usual post-indictment stage, where there can be no reason for a photo display except to influence the witness before testifying, *Davis v. United States,* 425 F.2d 673 (9th Cir. 1970); *United States v. Washabaugh,* 442 F.2d 1127 (9th Cir. 1971), and *People v. Gonzales,* 261 N.E.2d 605 (N.Y. 1970); we have further situation where the trial was actually in progress when the photos were displayed. Simply put, we are concerned with the willful use of impermissibly suggestive photographic identification procedure (*by the trial prosecutor in the midst of trial*) for the sole purpose of having witnesses, who had previously expressed an inability to do so, make positive identifications of a particular defendant.

Other relevant circumstances show (if Debbie Spoth's trial testimony is as believable as the State contends it was) that the prosecutor was in serious violation of a significant ethical duty that he owed to the defense. This duty required him to affirmatively disclose to the defense that this witness, who he must now say without reservation had a good and sufficient view, *was positive* that Cisternino *had not accurately been identified* by the State's chief witness. See *United States v. Agurs,* 427 U.S. 97, 112 (1976), and *Alabama v. Cannon,* 558 F.2d 1211 (5th Cir. 1977).

Hopefully the Court will agree something has to be grossly wrong if a trial prosecutor can insulate from judicial scrutiny his resort to an unnecessary and impermissibly suggestive photographic identification procedure simply by making certain he is alone with each witness when the photos are shown.

**A. Where Various Eyewitnesses Were Unable to Identify an Accused From Photographs Previously Shown to Them and From Still Other Photographs of the Accused That Had Been Seen by Them in the Newspapers and on Television, the Presence of Defense Counsel Was Required at a Photographic Display Made to These Witnesses While the Trial Was in Progress.**

In the Opinion below, the court saw *United States v. Ash,* 413 U.S. 300 (1973), as providing a complete response to the argument that, in the context of this case, due process required the presence of counsel when the photographs were shown the witnesses once the trial as in progress (App. A74). While *Ash* certainly has to be considered, still there are varying considerations here that have to be accommodated which were ignored by the court below. *First,* the critical confrontation in *Ash* occurred *before*

trial; whereas here, it took place *after* the trial had actually commenced. Also, the display here contained pictures that were highly suggestive and were willfully presented to the eyewitnesses in a suggestive manner. For, indeed, the sole purpose for encouraging the witnesses to identify a particular picture from those of the defendants in this case (R 3344-45, 3507), when previously they were unable to do so, could only have been to manufacture identification testimony for use at trial.

Here it is significant that in *Ash,* this Court did indicate the presence of counsel for the defense is required when his presence would be necessary "to produce equality in a trial-like adversary proceeding" present in any situation where his legal rights may be prejudiced in the absence of a professionally knowledgeable individual to present or preserve them. Additionally, as was rather cogently recognized by Justice Stewart concurring in *Ash,* this right of counsel also arises at any identification confrontation where the circumstances of the confrontation make counsel "essential 'to protect the fairness of the trial itself.' " (413 U.S., at 322).

Still another point made by this Court recognizes that the due process clause "does speak to the balance of forces between the accused and the accuser." *Wardius v. Oregon,* 412 U.S. 470, at 474 (1973). *Cf., United States v. Ash,* 413 U.S., at 309. Thus, our position here is that the determination of whether counsel was required to be present when these photos were shown to Debbie Spoth cannot turn solely on the rule announced in *Ash.* Rather, the essential question is whether the risk of prejudice in the particular procedure involved here was such that "the absence of counsel might [have] derogate[d] from his right to a fair trial." *Gilbert v. California,* 388 U.S. 263, at 267 (1967).

**B. Due Process Is Violated When the Prosecutor, in Quest of an Identification of a Particular Defendant, Unnecessarily Shows to Various Eyewitnesses Only Photographs of Those Indicted for the Particular Offense, Which Photographs Failed to Provide Any Realistic Alternative to the Identification of the Particular Defendant.**

The photographic identification displays involved in this case, apart from the positions taken above, also violated due process standards. Our starting point is the undeniable fact that any time photographs are shown to a witness, there is always the danger of an incorrect identification. This danger is necessarily increased as to a particular individual if his photograph is repeated in subsequent displays, or is otherwise emphasized or portrayed to the witness as the person whose identity is being sought.

In essence, our contentions are that the post-indictment, *ex parte*, photographic identification by Debbie Spoth was based on a grossly impermissibly suggestive photographic display. This is especially so here since the facts and circumstances showing this to be the case were developed in spite of the rather severe handicaps that were, only to a degree, surmounted. Thus, it is significant here that these unjustified handicaps, imposed on counsel by the trial court, were patently calculated to prevent the defense from demonstrating to the jury that Debbie Spoth's identification of Carabbia resulted from a procedure that was so inherently suggestive as to infect, and otherwise corrupt, her ability to make a reliable in-court identification.

Because the only photos shown the Spoths at this point were of the various defendants charged in this case, such become a very relevant factor. Again, of these pictures,

those of Licavoli, Lonardo, Calandra and Cisternino could not possibly have provided any challenge to the witness—Licavoli, Lonardo and Calandra all appeared to look their ages, well over 60. And, by her own testimony, Debbie Spoth was familiar with the picture of Cisternino whereas Sinito and Calabrese were readily excludable on the basis of age. They were too young, both in fact and appearance. Thus, in dealing with the test for determining the reliability of the identification evidence in this case, we are at once overwhelmed by the lack of *any* exigent circumstances to justify, to any extent, the abusive way in which the prosecutor handled the photographic identification procedures that were resorted to in this case.

It should also be noted the Court of Appeals concluded "[t]he fact that assistant prosecutor Carmen Marino, rather than a police officer, conducted the photo display is neither extraordinary nor suggestive . . . and that the Record does not reveal that he encouraged Mrs. Spoth to select the photo of Carabbia over any others" (App. A75). For our part, the court's position evidences a gross failure to even concede it to be possible that these court-pampered prosecutors are capable of chicanery. Hopefully, this Court will see the relationship between our inability to call this prosecutor as a witness (and develop among other things, whether he willfully made himself the only possible witness to the facts surrounding Debbie Spoth's identification of Carabbia's photograph) and the validation of her identification testimony. Since only the Spoths were allowed to testify as to what was said and done by Marino, obviously the issue is not one that can be resolved on general principles. *Cf., Swicegood v. Alabama*, 577 F.2d 1322 (5th Cir. 1978).

### C. Reliability Being the Critical Factor As to Any Identification Evidence Which Turns on "the Totality of the Circumstances Surrounding It," Any and All Facts Relevant to This Inquiry Are Properly for the Consideration of the Jury.

In dealing with the episode whereby the trial judge refused to allow the defense to show Gregory Spoth had actually identified one of defense counsel as the person in the room who most resembled the man in the back seat, the Court of Appeals reached a conclusion that makes absolutely no sense at all. Here we refer directly to the court's remarkable statement to the effect that the trial judge was really protecting the defendants from the incompetency of their attorneys because the elicitation of the evidence counsel sought to develop in this connection "could have operated to . . . prejudice" their clients "by allowing the jury to theorize who . . . most resembled the attorney who had been identified" (App. A76-A77).

The most absolute and irradicable flaw in the court's ratiocination on this point is not limited to the fact that any effort by the jury to determine who most resembled Ralph Sperli would have been irrelevant to the fact that the witness had actually eliminated Ronald Carabbia before he identified Sperli as most resembling the man in the back seat. This being so, for the appeals court to say the trial judge (whose overall performance in this case shows he was hardly trying to protect those on trial from the flagrant excesses indulged in by the prosecutor) was really protecting the defendants is ridiculous (App. A77). This is so because, apart from the fact that counsels' experience in defending criminal cases was at least equal to that of the judge, it makes even less sense to say that this judge (or any judge for that matter) necessarily knew more

about what was good or bad for these defendants than did their own *privately retained* counsel.

Another fact makes the inability of the defense to show Gregory Spoth picked attorney Sperli an error of significant proportion. Gregory Spoth was a professional art dealer who, by his own admission, had been trained to pay considerable attention to details—a necessary and special skill in the identification of art works. Here the Record shows Gregory Spoth actually conceded that he had been "trained to make determinations of structures of features; *i.e.*, eyes, nose, bone definition, things of this nature" (R 3585). Indeed, a skill somewhat comparable to Spoth's had been regarded as a significant identification factor. See *State v. Callaghan,* 526 S.W.2d 59 (Mo. App. 1975).

In finding against petitioners on the specific contentions here being made, the appellate court adopted some rather arbitrary positions (App. A69 *et seq.*). More importantly, the Opinion rather conspicuously ignored various significant tenets that had been called to its attention. Among these was the principle discussed in *Flowers v. Ohio,* 564 F.2d 748 (6th Cir. 1977). There it was held a defendant has a right to show that unduly suggestive identification procedures had, in fact, tainted the in-court identification evidence. And, that the limitation on the defense's cross-examination designed to accomplish this was a constitutional error. Indeed, in *Flowers* the Sixth Circuit specifically concluded that the jury was entitled to have the benefit of any evidence bearing on "the credibility of the in-court identifications" (564 F.2d, at 750). Similarly, even the Ohio Supreme Court had, in *State v. Hannah,* 54 Ohio St. 2d 84 (1978), reversed a conviction affirmed by the Court of Appeals involved in this case on the very same argument. Here it was concluded that "where [as here] a conviction must turn substantially upon

the identification of the defendant as the guilty actor . . ., *any* unreasonable limitation upon defendant's right to cross-examination . . . is prejudicial error" (syllabus).

Again, we are here concerned with petitioners' inability to show the existence of certain relevant factors during our cross-examination, not only of the Spoths, but of Detective Vanyo (who supplied the original pictures for the displays), Officer Volpe (showed the original pictures to the witnesses) and Lieutenant Wegas (who was privy to all these happenings).

As to Officer Volpe, the father of Debbie Spoth, the trial court sustained objections to inquiries as to: whether he (Volpe) knew that "an identification can be influenced by police officers" (R 3141); whether, as a 25-year police officer, he would in quest of an identification show a witness a picture that obviously did not conform with the discriptions submitted by such witness of the suspect (R 3142); whether he regarded it as proper to separate eyewitnesses before asking for an identification (R 3142); whether he made any effort to talk to the witnesses individually when they first gave him their descriptions (R 3144); whether his lack of knowledge at the time as to whether these eyewitnesses would testify "lessen[ed] in any degree his responsibility to preserve their testimony in a fundamental way" (R 3146); whether he was aware that "first descriptions are usually the best descriptions" (R. 3147); whether he tried to exploit (or tailor) their memory when he would talk with them (R 3148).

As to Lieutenant Vanyo, who admitted being most familiar with lineup techniques, the court barred an entire line of interrogation stemming from the question as to whether any lineup was ever conducted for these witnesses (R 3192). Also, Vanyo was prevented by the court from telling the defense whether his selection of

Ritson's picture without a beard "was to get him excluded in the identification of the witness" (R 3192-93).

In the Spoths' *voir dire* examination, the Record shows the court disallowed questions seeking to have Debbie Spoth (1) estimate Ronald Carabbia's weight (R 3350); and (2) take a closer look at him (R 3351).

The Record also shows that, at a most crucial point in Debbie Spoth's cross-examination, the court sustained objections to questions that asked her if, during her conversations with her father or any other member of the State's team, "there were some suggestions made to her as to the information they had as to who was in the back seat of the car" (R 3492). As to this particular question, its criticality cannot be disputed since the court made it clear that the defense would be refused the right to put the prosecutor, Carmen Marino, who had willfully and inextricably involved himself with, and was a material witness to what had occurred, on the witness stand (R 3400) —a ruling that necessarily influenced all cross-examination of these witnesses in the presence of the jury.

All this was then aggravated by the fact that during the prosecutor's in trial examination Gregory Spoth was *again* asked to look about the room to see if he could "identify anyone that was in the back seat of the Plymouth on October 6, 1977" (R 3656). Thus, it was that, despite having been shown a photograph of Carabbia by the State during their vigorous efforts to rehabilitate him following his identification of Sperli (R 3383), Gregory Spoth could only state there were several people that "look similar to the man in the back seat" (R 3567). Stated another way, Gregory Spoth assured the court he "could pick out people [then in the courtroom] that resemble[d] the person in the back seat" (R 3569).

Still later, and after the court had repeatedly indicated the defense would not be allowed to show through their cross-examination of Gregory Spoth his identification of one of the defense lawyers, Ralph Sperli, as being in the car with Ferritto (R 3568-3582), the court nonetheless acquiesced in the prosecutor asking Spoth still another question calling for an in-court identification. This time Gregory Spoth testified there were in the courtroom "individuals that look similar to that individual" (R 3583). However, even after this further effort by the State to manipulate Gregory Spoth into identifying Ronald Carabbia, the court again refused to allow cross-examination of Gregory Spoth as to whether he had "ever identified anybody . . . as being the person who . . . [he] believed resembled the person who was in the back seat on October the 6th" (R 3585).

What makes the court's restriction of defense counsel's cross-examination here all the more gross is that counsel for the State agreed with the defense that the court "should not exclude those witnesses from making the same identification before the jury as they did before the court without the jury here" (R 3399). Indeed, as put by counsel for the State, he did not "feel that there is any reason to exclude their testimony, including the fact that Mr. Spoth identified Sperli as resembling, as most resembling, the individual he saw in the car" (R 3399-3400).

In our view, as long as "cross-examination is the principal means by which the believability of . . . testimony is tested," its use simply cannot be stifled to the extent it was below. See *Davis v. Alaska,* 415 U.S. 308, at 316 (1974). It is clear then that the Opinion being challenged by this Petition, affirming the trial court's patent refusal to allow the defense to show this misidentification by an eyewitness, is contrary to law and makes constitutionally invalid these convictions. This conclusion must surely be

valid if it is still the law that as an essential requirement for a fair trial the defense must be allowed to engage in a searching and wide-ranging cross-examination of the witnesses who provide evidence against him. See *Smith v. Illinois,* 390 U.S. 129 (1968), and *Alford v. United States,* 282 U.S. 687 (1930).

### D. Neither the Summation of Counsel, nor His Cross-Examination of the Identification Witnesses, nor Even the Court's Instruction on the Credibility of the Various Witnesses May Be Regarded As a Sufficient Substitute for a Proper Instruction on Mistaken Identity.

Prior to argument, counsel for Carabbia submitted to the court in writing a specific instruction on eyewitness identification testimony. This instruction was patterned after the *Telfaire* decision and carries that name. The trial court denied the requested instruction as unacceptable (R 9771). After the court's written instruction was read to the jury, counsel *once more* called to the court's attention his desire for a *"Telfaire"*-type instruction and *again* complained that the court's given instruction was not merely insufficient insofar as eyewitness testimony was concerned, but was nonexistent (R 9771; 9385-9436). The court predictably ignored our objections to his charge (R 9840-41).

It is petitioners' position that the denial of a basic cautionary instruction on eyewitness identification testimony, such as was required in *United States v. Telfaire,* 469 F.2d 552 (D.C. Cir. 1972), constituted a prejudicial abuse of discretion under the unique facts at bar. *United States v. Greene,* 591 F.2d 471 (8th Cir. 1979) and *United States v. O'Neal,* 496 F.2d 368 (6th Cir. 1974). Also see *United States v. Hodges,* 515 F.2d 650 (7th Cir. 1975).

In *United States v. Greene, supra,* the court noted the special problems of reliability inherent to eyewitness identification testimony. To this end, the court concluded "it is essential that a jury be aware of the conditions under which the observation was made, the physical ability of the witnesses to observe the defendant, any possible problems which could distort the witness' observation powers and judgment." 491 F.2d, at 475.

Here, as was the situation in *United States v. Greene, supra,* Ronald Carabbia's mistaken identity theory was supported by strong alibi testimony. Thus, the *Greene* court's findings that this circumstance alone was sufficient "to warrant the additional protection against misidentification that the *Telfaire* instruction provides," 591 F.2d, at 476, is equally applicable to the facts at bar.

## II. AN ACCUSED IS DENIED A FAIR TRIAL AND DUE PROCESS OF LAW WHERE A TRIAL COURT ARBITRARILY AND UNREASONABLY RESTRICTS DEFENSE CROSS-EXAMINATION IN AREAS MATERIAL TO HIS DEFENSE.

As to the argument regarding the trial court's arbitrary restrictions on and denial of fundamental rights of confrontation and compulsory process, the Court of Appeals determined that the various FBI agents responsible for the investigation and theory of prosecution could present direct evidence for the State against the defendants but could still refuse to answer *any* question they deemed *inappropriate* on cross-examination. This was so even if the responses being sought might discredit testimony presented during their direct examination or would tend to disclose exculpatory evidence material to the defense.

The defense, of course, had informed the trial court it was essential to their defense that they develop the

victim Greene's intimate relationship with the FBI for whom we contended he worked for his own convenience (R 5587-90). It was established by exhibits, attached to pretrial motions, that the Cleveland Intelligence unit characterized the victim Greene as the "king" of organized crime in Cleveland and a prime suspect in "75 to 80%" of the area's recent bombings; and, that it was publicly suspected the victim Greene managed to escape prosecution for these crimes because of his work for the FBI as a "valuable" informant. Significantly, we now know that another FBI informant, Jimmy "The Weasel" Fratianno, who arranged for Ferritto (who was a business partner with another FBI informant, Frank "Bolo" Dovishaw) to kill still another FBI informant—Danny Greene. (It should be noted that Fratianno was involved in the murder of still another FBI informant—Frank "The Bomp" Bompensario in San Diego, California.) The defense argued that disclosure of this evidence was material and relevant because it exhibited a course of "outrageous" bad faith conduct on the part of those agents in charge of the varying aspects of this investigation and it was evidence of government "overinvolvement" in the crimes alleged.

The defense further argued that Danny Greene's true relationship with the FBI was of particular importance because it would show that other individuals never associated with the defendants Ferritto, Fratianno or other FBI informants, and reportedly involved in illegalities with the victim and closely tied to his murder, would have a more likely motive to kill Greene. Significantly, recent disclosures had revealed that individuals never associated with petitioners (*i.e.*, Liberatore, Thomas Lanci, Kenneth Ciarcia, Ronald Guiles and Louis Aratari) had obtained a confidenital list of FBI informants from a clerk, Geraldine Rabinowitz, employed at the Cleveland FBI office. It was contended that disclosure of the victim's informant status

and his relationship to the stolen documents was material to the defense because it tended to establish an alternate theory of the crime that was exculpatory to the defendants then on trial (R 5275-76; 5287-88). In fact, a story appearing in the *New York Times* revealed that Greene's informant status with the FBI and the leak of confidential documents by the FBI's Cleveland office may very well have been the reason for Greene's murder (R 1045).

During the course of the trial, defense counsel even attempted to discredit the State's case and elicit evidence favorable to their defense of alternate theories of the crime. Testimony presented by the State's chief witness was that he made numerous trips to Cleveland in furtherance of the murder conspiracy and stayed overnight at hotels alone (R 3787-88). Hotel records indicated that Ferritto had generally had a room with another individual (R 4561, 4559, 4575, 4586). Ferritto also testified that he was involved in a gambling operation with one Frank "Bolo" Dovishaw in Erie but that Dovishaw was not involved in the Greene murder (R 3957). Yet, and again contrary to Ferritto's supposedly reliable testimony, other evidence established that Dovishaw obtained the title and plates to the Plymouth used in the murder (R 2101, 2111); that Dovishaw had repairs made on the Plymouth just prior to the murder (R 2117); that Dovishaw had the Plymouth "wiped down" for fingerprints after the murder and painted a different color (R 4655-63, 4684, 4664); that Dovishaw abandoned the Plymouth and concealed other evidence relating to the Greene murder, including the license plates and keys and what looked like a remote control aerial (R 4667, 4688-90, 4729). It was also learned that Dovishaw had not been seen in Erie since about one month after the murder (R 4764-65).

FBI Special Agent Lenehan testified regarding evidence discovered at Dovishaw's home in Erie and relating to the Greene murder (R 4848). Defense counsel's efforts to question Lenehan regarding Dovishaw's involvement in the murder and his relationship to the FBI (R 4850, 4860) were met by the agent's refusal to answer on the grounds that the information was beyond the scope of his "authorization" (R 4855-56, 4863). The agent's refusal to answer these questions was ratified by the trial court on the basis of the naked representation of the Federal prosecutor that the information was privileged (R 4860-66). Petitioners were similarly restricted in their cross-examination of other agents regarding Dovishaw's involvement in the crime (R 5557-67, 5572-78).

In addition, the defense's attempts to elicit evidence from various FBI agents regarding the motives of other individuals known to the FBI to have sufficient motives to kill Greene if his informer status were disclosed was also prohibited (R 5260, 5266, 5273-76, 5287-88). However, at one point, the court made it clear Greene's association with the FBI was irrelevant and could not be elicited at all (R 4098, 5277).

Geraldine Rabinowitz, the clerk who stole and sold the confidential FBI documents, testified that Liberatore, Lanci and Ciarcia asked her for the identity of FBI informants (R 6953). Liberatore, Lanci and Ciarcia were said to have wanted this information for their own use (R 7027). Evidence previously presented had revealed that Greene had associated with Liberatore and Lanci and may have been set up by them (R 6276-78, 6353-54, 6280). Again, the court found that the contents of the documents were irrelevant (R 6805) and refused defense requests for the opportunity to inspect these documents (R 6794).

The defense's attempts to discredit the State's case by eliciting favorable evidence of an alternate theory of the crime were further frustrated when the trial court prohibited the witness Debbie Spoth from disclosing whether she knew Liberatore and Lanci and the nature of her relationship (R 2090-96). And, the defense was restricted from learning which FBI agent had participated in a search of Fulton Fish Market when a cache of weapons, fuses and explosives was seized relative to a search involving Liberatore, Lanci, Ciarcia, Arataria and Guiles (R 7282).

The Opinion below cites *United States, ex rel. Touhy v. Ragen,* 340 U.S. 462, 467-69 (1951), and *United States v. Allen,* 554 F.2d 398 (10th Cir. 1977), to support the trial court's position that a law enforcement agency's privilege (28 C.F.R. §§16.25 and 16.26) could justifiably result in the refusal of law enforcement agents to produce evidence *in camera* or answer questions on cross-examination which an accused represents to be material to his defense. For our part, it is clear that, under the facts at bar, the privilege asserted by the prosecution could not constitutionally override petitioners' fundamental rights to confront their accusers and produce exculpatory evidence in their defense.

**III. AN ACCUSED IS DENIED A FAIR TRIAL AND DUE PROCESS OF LAW WHERE THE TRIAL COURT REFUSES TO ORDER A SUPPRESSION HEARING AND COMPEL PRODUCTION OF SUBPOENAED WITNESSES TO DETERMINE THE ADMISSIBILITY OF EVIDENCE OBTAINED, OR DERIVATIVELY OBTAINED THROUGH A FACIALLY DEFECTIVE WARRANT AFFIDAVIT, ESPECIALLY WHEN THE AFFIDAVIT WAS:**

**(1) Used to Arrest the Accused and Was Relied Upon by the Trial Court in Denying Bail,**

**(2) Relied Upon by the State in Returning Its Indictment Against the Accused,**

**(3) Relied Upon by the Trial Court As a Basis for Joining Those Accused With Co-Defendants for Trial in a Capital Case,**

**(4) Represented by the State to Be Its "Theory of Prosecution" and Relied Upon by the Accused As a Bill of Particulars.**

In our view, the court's arbitrary conclusion that standing was lacking (App. A51-A52) had the effect of depriving Cisternino of the right to establish that his privacy interests were violated.

Here, of course, the State had to establish, on the basis of the December 5, 1977, affidavit of Agent Kahoe, "probable cause" to arrest, search, indict and incarcerate these petitioners without bail (R 282-85). This affidavit (App. A141) was said by the trial court to provide the State's theory of prosecution and was relied on by the trial court in joining, over objection, the various defendants for trial (R 282-85, 292, 309-16).

Contrary to the Opinion below that the affidavit contained only *"one"* falsehood (App. A52-A53), a substantial showing was made as to the presence of *many* falsehoods. To be sure, pretrial disclosures exposed Ferritto's *lies* about Cisternino's purported involvement in the crimes alleged (R 969-70, 988-90, 994); that he *lied* regarding defendant Fratianno's involvement (R 938); that he *lied* about the involvement of other unindicted individuals (R 973-75); and, that he concealed the identity of other individuals who were present at the murder scene and principal participants in the crimes alleged (R 980-93).

Other disclosures also showed that, contrary to representations made in the affidavit, defendant Fratianno was an FBI informant and that he had informed the FBI he was not involved in the Greene murder. Moreover, Carabbia contended the affidavits misrepresented the innocent nature of a telephone conversation with Fratianno and subpoeaned Fratianno to establish this fact (R 309-10, 537-52, 824).

Pretrial disclosure further revealed that, *prior* to Greene's murder, informant-defendant Fratianno received a call from "Pat Foran". Special Agent Patrick J. Foran was the agent in charge of the FBI's organized crime squad in Cleveland and was primarily responsible for the FBI's target investigation of the indicted co-defendants. The name "Foran" also appeared on an envelope seized from Louis Aratari after his arrest. Inside the envelope was the exact location where Aratari was arrested (R 4100-01).

Following these disclosures, a series of motions were made to the trial court, including a motion to reopen the suppression hearings for the purpose of penetrating further the facially defective affidavit (R 672-93, 902-54, 965-93). To this end, defense counsel subpoenaed Ferritto and Fratianno to demonstrate that the affidavit contained ma-

terial misrepresentations of fact necessary to the finding of probable cause (R 672, 713-16, 763-66, 931-32). Special Agent Foran was also subpoenaed (R 558).

Again, the trial court denied these requests *not* because they lacked merit, but rather, on the grounds that the court lacked the jurisdiction over information and witnesses represented to be privileged and under the control of Federal law enforcement agents (R 712-20, 808, 947).

All this demonstrates the affidavit contained false information from an unreliable informer (¶¶20-45) and that information purporting to corroborate the informer was also shown to be untrue (¶¶46-49; App. A158-A162). Under such circumstances, the trial court had a duty to conduct a suppression hearing.

## IV. THE ADMISSION OF EVIDENCE DERIVED FROM SEARCHES AND SEIZURES WHICH WERE VIOLATIVE OF FOURTH, FIFTH, AND FOURTEENTH AMENDMENT RIGHTS REQUIRES REVERSAL OF THE DEFENDANTS' CONVICTIONS.

Since the affidavit referred to above provided the sole basis for the December 5, 1977, search of #333 Winchester Hills and was incorporated as a basis for the December 13, 1977, search of 919 Rondel, and because this affidavit was, in large part, based upon the representations of Raymond Ferritto (many of which were ultimately conceded to be outright lies [R 1068]); it is our contention that all evidence seized during these searches should have been suppressed. This thesis is supported by the following arguments:

### A. Evidence Was Improperly Seized During a Search of Apartment #333, Winchester Hills Apartments, Willoughby Hills, Ohio, on December 5, 1977, and December 13, 1977.

On December 5th and 13th, 1977, Apartment #333, Winchester Hills was searched pursuant to the issuance of these warrants. This apartment was allegedly used by the defendants and the bomb, according to Ferritto, was assembled there by Cisternino on the morning of the bombing. Included among the items found on December 5th were miscellaneous pieces of a Gold Circle label (Ex. 137E), a rent receipt in the name of Zolton Kalmon (Ex. 137A), two rolls of electrical tape (Ex. 137G), and a Tennelec Memory Scan manual (Ex. 137H) (R 5016-20). Subsequent testimony established the fingerprints of Cisternino, Alfred Calabrese, and one Carmen Marconi were on this manual. During the search of December 13th, a piece of wire insulation was found, a can of deodorized paint thinner (Ex. 100) and some carpet samples (R 4994).

In the affidavit, Ferritto was credited with advising the affiant that he was taken to Apartment 333, Winchester Hills, by Cisternino where he stayed, alone, overnight. He was allegedly met there the next morning by Cisternino who brought with him bomb paraphernalia. At the apartment, Ferritto advised Cisternino assembled the bomb (App. A154-A155). Moreover, as a further illustration of lies by "reliable" Raymond Ferritto, co-defendant Aratari testified as a State's witness during the trial that the bomb car was "already loaded" and in place the night before and was, in fact, the reason it could not be moved out of the lot (R 6312, 6364). (Ferritto, in his affidavit, said Cisternino drove the car to the bombing scene the day of the bombing.) Purged of the erroneous statements, counsel suggests that the affidavits do not provide probable cause to search Apartment 333, Winchester Hills. Counsel con-

tends that more than ample cause existed to believe Ferritto's trustworthiness was suspect from the beginning.

On December 13th, Agent Domin submitted to the United States Magistrate an affidavit in support of another search of #333 Winchester Hills. This search was directed to taking samples of orange and brown shag carpeting and fingerprints on surfaces within the apartment. The affidavit alleged in pertinent part that: 1) in the December 5th search of Apartment 333, the executing officers observed orange and brown shag carpeting, and 2) that the Affiant had learned through his conversations with detective Wegas of the Lyndhurst Police Department, who also participated in the December 5th search of Apartment #333, address *supra,* that fibers observed on the metal bomb box found at the residence of Daniel Greene (the same bomb box which Ferritto advised agent Kahoe that he [Ferritto] and Cisternino placed in front of Greene's residence in September of 1977) appeared to be the same as the carpeting observed in Apartment #333, Winchester Hills in their December 5th search of said apartment (#5, p. 4, of Agent Domin's affidavit). Affiant, in support of his proposed search, incorporated by reference the affidavit submitted by Agent Kahoe in support of the December 5th search of Apartment #333.

**B. (1) Evidence Was Improperly Seized During a Search of 919 Rondel, Cleveland, Ohio, of February 6, 1978.**

On February 6, 1978, pursuant to an affidavit provided by Agent Kimmel and incorporating the Kahoe affidavit of December 5, 1977, a search was conducted at the home of Donald Ready, allegedly the location where Cisternino had been living off and on as a boarder during the summer and fall of 1977. Included among the items seized at this location were (starting at R 5220), a paper bearing radio

frequencies (Ex. 139A), a list of radio frequencies and license numbers (Ex. 139C), a hearing protector and gun cleaning kit (Ex. 139F), an ammunition belt (Ex. 139H), a room key for the Holiday Inn (Ex. 139I; note that there was evidence that Ferritto stayed there at one time), an alligator clip (Ex. 139J), a throwing knife (Ex. 139K), a cup with ammunition (Ex. 139L), .45 ammunition and holster (Ex. 139R), 9mm ammunition and clip (Ex. 139T), a radio crystal (Ex. 139U) and other items such as holster, ammunition, etc. The affidavit of February 6, 1978, incorporated the Kahoe affidavit of December 5, 1977, and for all the prior asserted reasons dealing with material misrepresentations and again herein incorporated, the items seized pursuant to this search should be suppressed.

**(2) The Information Asserted in the Affidavit Was Too Remote in Time to Establish Probable Cause.**

In the February 6, 1977, affidavit of Agent Kimmel, he noted that Ferritto told him a radio scanner (which incidentally was never found) was used by Cisternino as a precaution (¶12, p. 5, of affidavit). According to Ferritto, after the bombing of Greene, he (Ferritto) and Cisternino returned to Apartment #333, Winchester Hills. (During his testimony, Ferritto admitted this was a lie.) Since the scanner *supposedly was last seen on October 6, 1977, at Apartment #333,* the question that emerges is where is the probable cause to believe, some four or five months after this observation, the scanner could be found at another location at 919 Rondel, Cleveland, Ohio. This is especially so since Ferritto testified the last time he was on Rondel was during May of 1977—some *nine months* previous to the affidavit (R 3832).

**C. Standing Was Improperly Denied.**

As to the location at 919 Rondel, it would appear contradictory for the State to argue petitioner Cisternino had no standing to object when the affidavit in support of the search represents that Cisternino lived at this address with a friend and had meetings there with co-defendant Ferritto. This fact was confirmed by one Donald Ready and State's witness Raymond Ferritto during the course of the trial (R 8340). Moreover, some of the seized items were claimed by the State to have belonged to Cisternino and used by him in the Greene matter. As to the location at #333 Winchester, the Kahoe affidavit claims that Cisternino had the apartment key, brought Ferritto to this location and left him overnight. Cisternino allegedly returned to this apartment the next morning with equipment and assembled the bomb. The State's contention of Cisternino's occupancy of this apartment is further enhanced by their claim that the Tennelec Memory Scan manual bearing his prints (Ex. 137H) was used by him in the apartment. Also, according to Ferritto's affidavit, Cisternino was apparently the only person in possession of that apartment.

## V. AN ACCUSED IS DENIED A FAIR TRIAL WITH DUE PROCESS OF LAW WHERE THE STATE'S PROSECUTOR WILLFULLY, AND WITH THE EXPRESS APPROVAL OF THE TRIAL JUDGE:

**(1) Makes a Highly Emotional Argument, Punctuated by Personal References, Specifically Calculated to Stir Up Racially Prejudicial Attitudes and Otherwise Appeal to Popular Ethnic Stereotypes;**

**(2) Informs the Jury That He, the State Prosecutor, and All of the Federal and Local Investigators in the Case, Knew As a Fact Those on Trial Were Not Only Guilty of the Specific Charges Being Tried, but Other Serious Charges As Well—Including, but Not Limited to, Murders and the Bribery of Judges and Prosecutors;**

**(3) Argues That the Various Defense Attorneys Involved in the Case Were Likewise Convinced Their Own Clients Were Guilty;**

**(4) Commits Numerous Other Acts of Professional Misconduct.**

Distilled, and at best, the various segments of the prosecutor's tirade[4] set forth below were flagrant acts of misconduct. *State v. Thayer*, 124 Ohio St. 1 (1931). At worst, they amounted to deliberate attempts to strengthen the State's case against those on trial by impermissible factors and considerations. In our view, the State should not be grateful for such aid. This is especially so if our prosecutors are to be barred from summoning, for the pur-

---

4. The entire argument made by the prosecutor appears at App. A102-A127.

pose of achieving a conviction, "that thirteenth juror, prejudice." *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, at 659 (1945). Here we refer to certain remarks that were obviously well-calculated to appeal to prejudice based on national origin and thus, "to sweep jurors beyond a fair and calm consideration of the evidence." In this instance, his argument was an unfortunate appeal to popular ethnic stereotypes ". . . [far] beyond permissible limits." *Commonwealth v. Graziano*, 331 N.E.2d 808 (Mass. 1975).

To be sure, neither the fact that a particular crime was a vile one, nor even the amount, or lack of, evidence against those accused could possibly justify restoring to the type of vituperative arguments indulged in by the prosecutor in this case. The fact that much of the argument was made with the aggressive and persistent approval of the trial court adds a further significant dimension to our complaint.

In our judgment, the level of outrageousness actually achieved by this prosecutor exceeded even that which our Court of Appeals, in *Lonardo v. Ohio*, 34 Ohio Law Rept. 434 (1931), labeled as being "almost unheard of in its latitude of vituperation and bitterness" (*Id.*, at 437). As will be seen, the remarks of this prosecutor, one Carmen Marino, show beyond any possible dispute a virtual litany of prosecutorial anathema that was unavoidably prejudicial to these petitioners. See *ABA's Standards Relating to the Prosecution Function and the Defense Function, Approved Draft (1971)*, ¶¶5.8(c) & (d).

Additionally, the prosecutor impermissibly burdened petitioners' fair trial rights by arguing to the jury that our Government lost, as a consequence of Greene's death, a valued informant in their war on crime. The effect of this statement, which was accentuated throughout his

argument, could only have been to further prejudice the jury against the defense from the standpoint that it tended to *compromise Petitioners' constitutional right of confrontation.* This conduct was exacerbated by the fact that the court had frustrated all efforts by the defense: *first,* to show that Danny Greene was not merely an informant but one of the worst possible sort because he was protected by the FBI in his own criminal activities; and, *second,* to show Danny Greene had been given, by the FBI, an implied license to kill his enemies if they were also enemies of the FBI.

While we are convinced that, regardless of the cogency of any argument made, there was no way our *court* was going to reverse; for us it is clear beyond any doubt that prosecutor Marino's final argument was the most reprehensible, and *unprofessional,* ever given in any American courtroom since the prosecutors in the South were compelled to stop using racial epithets. Thus, for an appeals court to have concluded this prosecutor only deserved to be told they do not "condone" some of his references (App. A99) would be laughable were it not for the seriousness of the case *and* of his conduct.

At the outset, this Court will surely agree there must be a point where any court would be required to reverse a conviction and/or do something other than slap the offending prosecutor on the wrists (as was done here) because of an argument made by him. This being so, as it surely must be, the court's failure to do either here can only be deemed valid if that court's findings as to the relevant facts and application of the law can survive meaningful scrutiny.

*First,* we address the Court of Appeals' patently erroneous premise that counsel for Cisternino only objected three (3) times and Carabbia's counsel only once, where

the trial records shows at least ten objections. The court then tortured this asserted "fact" into the absolutely incredible conclusion that counsels' failure to object more often was "indicative that they did not think the bulk of the argument improper at the time" (App. A99). Aside from being a *non sequitur,* the court must have been oblivious to the fact that *other counsel repeatedly objected throughout the entire course of the vicious argument,* which objections were entered in response to the overwhelming bulk of its contents. All counsel further moved for a *mistrial* because of the argument made. And, the Opinion ignored the stipulation that *the various objections made by any defense counsel extended to the benefit of all defendants.* (The further fact that the State has yet to make the ridiculous contention that petitioners waived objections to *any* aspect of this unethical argument is more than merely enlightening.)

*Second,* the Opinion of the Court of Appeals oraculated that the prosecutor's gross remarks were not designed to bolster the credibility of the State's witnesses. If this is so, the unanswered question, if such was not their purpose is: was the court saying they had no purpose and, for that reason, had no effect? Apart from the fact that god-like conclusions really have no place in any lawsuit, the court should have credited the fact that Carmen Marino was not a rookie prosecutor. And, perforce, was aware of their undaunted penchant for excusing abusive tactics of this ilk if otherwise convinced the accused was, after all, guilty. Had this factor been credited, the court then would have been compelled to deal with the irrepressible idea that the prosecutor's resort to the egregious argument made by him was the result of a well-calculated, deliberate gamble that our courts would not dare do more than mildly rebuke him and surely would not break its routine pattern of deeming such arguments, no matter how gross, to be harmless.

*Third*, the Opinion of the Court of Appeals grossly misapprehended the impact of Marino's arguments. It also failed to assay the trial court's response thereto which was in the presence of the jury. If it were otherwise, there is no way the court could have written that Carmen Marino's abuses were *mere aberrations* (App. A98). And, just as surely, the Opinion would not have exonerated the trial judge by using language that camouflaged his almost total abdication to the prosecutor. Here we refer to the Opinion's inaccurate conclusion that "for the most flagrant remarks the Court gave curative instructions admonishing the jury to disregard the comments" (App. A99).

Now admittedly, which of the countless egregious remarks made by prosecutor Marino were the most unethical and unprofessional is surely debatable. But, included in any contest for that distinction would be the following "aberrations" that *were approved* by the trial court:

(1)

> "The people we are after are the people involved in organized crime. And these men have put a lot on you in the last two days, trying to shed some doubt in a case where there is none.
>
> Now, *we are not walking into an organized crime case with innocent citizens if we are not absolutely sure that these five men are guilty.*" (App. A102.)

* * * * *

(2)

> "Now one of the major points in this case that shows *we knew what these men were doing, we knew that they were planning to kill Danny Greene. They had attempted it before. And they successfully com-*

*pleted the murder of Danny Greene and we couldn't stop it.*" (App. A102-A103.)

* * * * *

(3)

"*What I am telling you is that we knew they were trying to kill Danny Greene and we couldn't stop it.* And if that is an admission of failure, then that is a criticism we have always had with every bombing homicide case in this county." (App. A105.)

* * * * *

(4)

"*. . . [T]here is not one bit of evidence in this case, with the exception that Sinito worked as a bartender, to make these men in any way decent citizens.*" (App. A109.)

* * * * *

(5)

"We dealt with Fratianno, and we squeezed him, too.

Mr. Yelksy: I will object to this your Honor.

The Court: *Overruled.*

Mr. Marino: We sat that man down—and he is an old man too, folks. We sat him down, and the agreement was, because he introduced Ferritto to Delsanter he was a part of the conspiracy, *and we gave him the fine choice of sitting right next to his friend Jack White and going to trial in this case, if he thought he was innocent or there was a reasonable doubt,* or to plead guilty to everything, the very charges we have here, taking his five years from Ohio, and he has to

testify against the organized crime family in Los Angeles." (App. A112.)

* * * * *

(6)

"Remember things like Bonnarigo's photograph in Danny Greene's satchel. And Bonnarigo's, Marconi's and Cisternino's fingerprints on a Cleveland magazine at 919 Rondel.

*And since no one had expressed any Opinion as to how that mug shot of Bonnarigo got in Danny Greene's satchel, I will express an opinion. I think the law enforcement community gave it to him. I think they knew he was going to be murdered, or at least an attempt made on his life.*

Mr. Willis: Objection.

The Court: *Overruled.*

Mr. Marino: And they gave him as much protection as they could." (App. A115.)

* * * * *

(7)

". . . [O]nly criminals know about organized crime. Only murderers know what goes on in this society.

And when they try to tell you that it is a fictitious organization, folks, *there are certain things that each person knows about his own background.* No matter where you come from, no matter what your ethnic background is, *you know there are certain things peculiar to your background.*

*And [as an Italian] I can tell you this, that the organization is not fictitious. They determine what*

*the membership is, and it is quite obvious. And that is not an ethnic slur.*

These people are a monkey on the back of society folks. *These people are murderers."* (App. A116.)

* * * * *

(8)

"And all of a sudden we charge these people with engaging in organized crime, because their gambling is on such a high level that it corrupts society, that *they get to the judges, the prosecutors, yes, and the police.*

Mr. Willis: *Objection, your Honor. There is no evidence on that.*

The Court: *Overruled.*

Mr. Marino: That stinks. And *it is not brought out in the courtroom, because we, the law enforcement community, have been quite inept over the last 90 or 100 years in getting these people to trial."* (App. A117.)

* * * * *

(9)

Mr. Marino: Well, let's look at it from the standpoint of other criminals in this case. Obviously, John Calandra had done much more in this case than anyone else. Why don't they pin it on John Calandra, Licavoli's right hand man? The man who interceded between all the other individuals connected with this case. Why don't they put the rap on him?

Because he's in jail with them, folks. That's why. He is right across the hall here.

Mr. Willis: Objection your honor. *There is no evidence of that.*

The Court: *Overruled.* (App. A118.)

* * * * *

(10)

"But let's face it, folks. Were they put in a dilemma? They claimed they didn't know anything about it. But yet counsel for Mr. Cisternino not only defends his own client, but he defends Jack Licavoli over there. They claim he didn't know the positions of the men in the car. Well, *that's a lie right there.*

Mr. Sperli: *Objection.*

The Court: *Overruled.*

Mr. Marino: Their only problem was, ladies and gentlemen, *those attorneys couldn't tell us that without admitting their clients' complicity.*

Mr. Willis: Objection.

Mr. Sperli: Objection. Absolutely—objection.

The Court: *Overruled.*

Mr. Marino: *So they [the various defense counsel] know that Carabbia was in the back seat. They know Cisternino was at Winchester."* (App. A119.)

* * * * *

(11)

Mr. Marino: *This is no search for the truth. That's the most utterly ridiculous statement I ever heard, whether it came from a prosecutor or a defense attorney.* If this were a search for the truth, ladies and gentlemen it would be an investigation, and every-

one who knows anything about it would cooperate, come forward and make statements. (App. A125.)

* * * * *

(12)

"Then I ask you this. The first person you vote on, you vote on Carabbia. *Because we are 100 per cent sure, from the time we knew he was involved in the—and that was before Mr. Ferritto made his statement,* because we had the toll record of every defendant pulled in this case before Ferritto turned State's evidence.

Mr. Policy: I am going to object to that, because there was no evidence to that effect.

The Court: The jury will rely on its recollection concerning the evidence." (App. A125-A126.) (Emphasis added.)

While the court below adamantly maintained in its Opinion that these unethical remarks made by Mr. Carmen Marino constituted "a rather brief, unfortunate performance during a long closing argument" (App. A98), any analysis of the entirety of this summation shows that neither the abuses delineated nor the argument itself was brief. In fact, the abuses dominated more than two-thirds of his remarks. But, even this is not all. Even more indefensible, because *it is simply wrong,* is the Opinion's arbitrary proclamation that "for the most flagrant remarks, the Court gave cautionary instructions" to the jury (App. A99). This is so because nothing, absolutely nothing, that the trial court told the jury to disregard was (or possibly could be) as *unpardonable* as any one of the segments numbered ¶¶1, 6, 7, 8, 9, 10 and 12 as indicated above. For obviously, none of the remarks the trial court told the jury

to disregard could possibly be as manifestly prejudicial as the above litany of things the trial court affirmatively authorized the prosecutor to tell the jury.

Here, we refer to the fact that the trial judge approved of the prosecutor telling the jury that he and the various enforcement agents involved in this case in investigating and prosecuting the charges "were absolutely sure" Carabbia and Cisternino were guilty (¶1); that they knew *before* Danny Greene was killed that these petitioners were planning to kill Danny Greene and that they had tried to kill him before (*ibid.*); that his "opinion" (that is, Marino's) was that the police "knew . . . [Greene] was going to be murdered, or at least an attempt made on his life" (¶7); that the reason the defendants did not try to pin the crime on Calandra was because he was "in jail with them" (¶9).[5]

Surely, the Court will agree the above analysis thoroughly confutes the appellate court's expressed belief that the trial judge directed the jury to disregard *the most flagrant* of the prosecutor's unethical remarks. For each of those referred to above were far more flagrant violations of the prosecutor's ethical duty than any of the various comments the jury was told by the court to disregard.

But even this is not all—a total decimation and annihilation of the Opinion's point in this regard is furnished by the above segments of the Record. Also, it is our view that Carmen Marino's argument was one of the most flagrantly prejudicial given in recent times in any American courtroom. For nothing could possibly be worse

---

5. In addition to the above list, which was not submitted as being complete, the Court of Appeals noted the prosecutor also "intimated Anthony Liberatore [who was then a fugitive] would not live to be tried." (App. A98).

than for a prosecutor (any prosecutor) to argue that the defendant's *own counsel* believes he is guilty (¶10). Simply to say the the unavoidable thrust of that isolatable segment of his argument violated the most essential aspects of a fair trial should have sufficed. However, since it so obviously violated the right of counsel, *Chandler v. State*, 572 P.2d 285 (Okla. 1977), and the right of confrontation, the Opinion's selection of the other aspects of Marino's argument as being more flagrant makes the Opinion's harmless error conclusion all the more defective.

Obviously, the prosecutor's argument in this regard was a willful attack on the specific guarantees of the right to effective representation and confrontation of the witnesses. In addition, the argument artificially created a solid basis for the irrepressible inference that defense counsel not only believed their clients were, in fact, guilty; but, that they were themselves guilty of actually trying to deceive the jury.

The fact that these remarks were certainly not inadvertent, *People v. Weathers*, 62 Ill. 2d 114, 338 N.E. 2d 880 (1975), leads inexorably to the conclusion that they were willful. But, even this is not all. A further aspect of this denigration of counsel is that more than a mere possibility was artificially created for the jurors to infer the prosecutor intended by such remarks to make known some personal knowledge he possessed, gained from confidential sources, that defense counsel were convinced of their clients' guilt. *People v. Tassiello*, 300 N.Y. 425, 91 N.E.2d 872 (1950); *Commonwealth v. Joyner*, 365 A.2d 1233 (Pa. 1976); *People v. Treat*, 43 N.W. 983 (Mich. 1889); *People v. Monroe*, 362 N.E.2d 295 (Ill. 1977). Also, see *Lawn v. United States*, 355 U.S. 339, 359-360, n.15 (1958).

This case then provides the Court with an apt opportunity to reinforce the doctrine proscribing the type of professional misconduct exhibited in the argument made by the prosecutor in this case. Such reinforcement is doubtless needed for, if it were otherwise, the various State courts below surely would have recognized that such arguments as were made here not only violate due process (*Viereck v. United States,* 318 U.S. 236 [1943]; *Berger v. United States,* 295 U.S. 78 [1935]; and *United States v. Love,* 534 F.2d 87 [6th Cir. 1976]) and are unprofessional (*ABA, Standards, Prosecutor's Function,* ¶¶5.8 and 5.9, pp. 40 and 126); they would have also realized such arguments are "incompatible with the proper administration of justice." *United States v. Bugros,* 304 F.2d 177, at 179 (2d Cir. 1952). Also see ABA, *Code of Professional Responsibility,* §DR7-106(c)(4), and its *Canons of Ethics,* No. 22.

Dealing more specifically with the appellate court's Opinion, the bottom line on its approval of the prosecutor's summation seems to be that because the trial judge told the jury on six (6) occasions to disregard certain of the wrongs committed during the prosecutor's almost thirty-seven page tirade, he should be given absolution since these petitioners were, after all, guilty. Further, that despite the fact that more than *FORTY-THREE* (43) objections in all were made by defense counsel during the course of this prosecutor's argument, his specific attack on counsel's integrity and his open assault on petitioners' right to the effective assistance of counsel were mere *aberrations.* The same being true of the prosecutor's direct and specific expressions of opinions on the petitioners' guilt and his blatant excursions outside the Record.

For our part, even the few arguments which were subject to the given cautionary instructions were so egre-

gious as to be incurable by the corrective instructions that were given in those isolated instances. This is especially so once the prosecutor made his direct appeal to ethnic prejudices. *McFarland v. Smith,* 611 F.2d 414 (2d Cir. 1979); see also, *Commonwealth v. Graziano,* 331 N.E.2d 808 (1975).

Hopefully, this Court will be persuaded by *People v. Weathers,* 62 Ill. 2d 114 (1975), where the prosecutor charged defense counsel with lying, as did Carmen Marino in his summation in this case. See also *People v. Kane,* 393 N.Y.S.2d 439 (1977) (prosecutor stated legal aid attorney did not believe his client innocent); *Russell v. State,* 532 S.W.2d 268 (Tenn. 1976) (error to attribute to counsel fabrication of insanity defense).

It is also our view that it is not without significance that the Opinion below contains no reference whatsoever to the personal attacks made on counsel during the course of the prosecutor's peroration. Surely, the fact that these vitriolic attacks, as the Record set forth above clearly shows, were made with the affirmatively *expressed approval of the trial court, who repeatedly rejected defense objections,* merited for them individualized consideration. This is especially so since it cannot be denied a prosecutor's summation can produce errors of constitutional proportions. *Donnelly v. DeChristoforo,* 416 U.S. 637 (1974).

Finally, as to the efficacy of the curative instructions given by the trial court to correct several of the *other* prejudicial excesses in the prosecutor's argument, the statement made in *United States v. Rudolph,* 403 F.2d 805 (6th Cir. 1968), another case tried in Cleveland, seems especially appropriate. Here it was stated (in a situation where, unlike the present case, the jury was specifically instructed as to all wrongs involved) that it must be re-

membered that "after the saber thrust, the withdrawal still leaves the wound" (*id.*, at 807).

To be sure, for our part "if you throw a skunk into the jury box" as was done by Carmen Marino, "it makes no sense to instruct the jury not to smell it or to say they did not smell it." *Dunn v. United States*, 307 F.2d 883, at 886 (5th Cir. 1962). It makes even less sense to tell a jury it is alright to smell the skunk and then conclude its smell nonetheless had no effect on their ability to detect and correctly identify the fragrances of the other odors present.

## CONCLUSION

Based on the opinions below where, as here, a witness looking at a photographic array that was grossly *slanted* against a particular individual could only say such person came closest to resembling the suspect; it is nonetheless perfectly all right for the prosecutor to tell the witness she picked the right person. In addition, according to these same courts, it is simply not prejudicial for the prosecutor to argue to the jury that not only were all of the law enforcement people involved in the investigation fully convinced these petitioners were guilty, but so were the various defense counsel.

If nothing else, these arguments in particular clearly show the relative ease with which the rules of fair play can be flaunted by zealous prosecutors. And, it shows a penchant by Ohio's reviewing courts to simply ignore even grievous flaws if they are convinced the verdict was correct.

Hopefully, this Court will be persuaded that a new trial is required to avoid the reproach that justice may have miscarried here solely because the trial prosecutor

was allowed to operate in open defiance of ethical and due process restrictions on his conduct.

Respectfully submitted,

JAMES R. WILLIS
*Attorney for Petitioners*

80-1397

No. .....

Office-Supreme Court, U.S.
FILED
FEB 17 1981
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CLERK

# In the Supreme Court of the United States

**October Term, 1980**

RONALD CARABBIA,

and,

PASQUALE CISTERNINO,
*Petitioners,*

vs.

STATE OF OHIO,
*Respondent.*

## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE EIGHTH DISTRICT COURT OF APPEALS CUYAHOGA COUNTY, OHIO

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## APPENDIX A

**Entry of the Ohio Supreme Court Dismissing Appeal**

(Dated December 4, 1980)

No. 80-1280

THE SUPREME COURT OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS.

---

STATE OF OHIO,
*Appellee,*

vs.

RONALD CARABBIA and PASQUALE CISTERNINO,
*Appellants.*

---

APPEAL FROM THE COURT OF APPEALS
FOR CUYAHOGA COUNTY

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

## APPENDIX B

**Entry of the Ohio Supreme Court Denying Leave to Appeal**

(Dated December 4, 1980)

No. 80-1280

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS.

---

STATE OF OHIO,
*Appellee,*

vs.

RONALD CARABBIA and PASQUALE CISTERNINO,
*Appellants.*

---

MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS FOR CUYAHOGA COUNTY

It is ordered by the Court that this motion is overruled.

## APPENDIX C

**Entry by Ohio Court of Appeals Denying Motion for Reconsideration**

(Dated July 29, 1980)

Nos. 39916, 39894

COURT OF APPEALS OF OHIO
EIGHTH DISTRICT, COUNTY OF CUYAHOGA

---

STATE OF OHIO,
*Appellee,*

vs.

PASQUALE CISTERNINO and RONALD CARABBIA,
*Appellants.*

---

JOURNAL ENTRY

Motion by appellants for reconsideration overruled. Exc.

/s/ SAUL G. STILLMAN
*Presiding Judge*

STILLMAN, *P.J.*, KRENZLER, *C.J.*, PATTON, *J.*, concur

## APPENDIX D

**Reply to State's Answer to Motion for Reconsideration**

(Dated July 25, 1980)

Case Nos. 39894 and 39916

IN THE COURT OF APPEALS
EIGHTH JUDICIAL DISTRICT OF OHIO
CUYAHOGA COUNTY

---

STATE OF OHIO,
*Plaintiff-Appellee,*

vs.

RONALD CARABBIA and PASQUALE CISTERNINO,
*Defendants-Appellants.*

---

REPLY TO STATE'S ANSWER TO MOTION FOR RECONSIDERATION

Most apparent to any careful reader, the prosecutor, in justification of his own unpardonable conduct, has in his *Answer* to our application once again gone outside the Record for his "facts." This penchant for ignoring the relevant considerations clearly shows, and proves, the diatribe he gave as a summation was willfully conceived for the sole purpose of having the jury convict somebody, anybody, in this case—which is exactly what they did.

In any event, Marino's Reply to our showing that this Court was clearly mistaken (as it surely was) in its analysis of his summation is conspicuously absent. In

any event, if this Court were not mistaken, there is simply no way it could have been concluded that Marino's flagrant and abusive transgressions were mere "aberrations." Or, that for the worst of these, cautionary instructions were given.

In further line with our formidable contentions, this Court should seriously consider the case of *McFarland v. Smith*, 611 F.2d 414 (2d Cir. 1979). There the court viewed *a racial argument* (likened to a lesser degree to the one the trial judge here *approved*) as being *"constitutionally* impermissible" (*id.*, at 419, emphasis added). In that court's view, *contrary to the position taken by the trial judge and by this Court,* any argument that "invokes race for a purpose that is either illogical or of very slight and uncertain validity, and does so at the distinct risk of stirring up racially prejudiced attitudes" violates the Constitution; so much so that "[t]hey must be condemned whenever they appear" (*id.*, at 419). Finally, in *McFarland* the court took a step this Court has been simply unwilling to take. It concluded as a bottom line that "[t]he Constitution forbids racial remarks in the summations that preceded petitioner's conviction." The fact that the *McFarland* case originated in a habeas corpus action based on a State Court conviction portends the ultimate fate of the convictions of these appellants. This it does with unmistakable clarity.

Also see *United States v. Gleason,* 616 F.2d 2, at p. 27, fn. 19. There the court expressed the idea that "scurrilous statements, which indicate a reckless disregard by counsel for the facts of the Record, exceed the bounds of responsible advocacy in our adversarial system and merit consideration by the Bar Association Grievance Committee for appropriate action." This thought seems especially appropriate here, since the argument assailed in *Gleason*

was in a Brief directed to the court itself. If we credit their thoughts as valid, then it necessarily follows, since Marino's scurrilous statements were directed to a jury, that his attitude in defense of his tirade becomes even more ridiculous.

Then there is *United States v. Stahl,* 616 F.2d 30 (2d Cir. 1980). In *Stahl* the court, after citing examples of what the prosecutor in that case had said, none of which could possibly be as gross as those segments of Marino's summation that have been emphasized, concluded such examples clearly "indicate[d] the prosecutor's strategy—a strategy that obviously included a persistent appeal to class [in our case it was race] prejudice." As put by that court, "because such appeals have no place in a courtroom . . . [they] were compelled to reverse" (*id.,* at 32-33).

A very good explanation of the rule barring personal opinions by our prosecutors was set forth in *United States v. Morris,* 568 F.2d 396 (5th Cir. 1978). There it was stated:

> "These limitations on attorneys' arguments to juries exist for two reasons. First, an attorney's statement of his beliefs impinges on the jury's function of determining the guilt or liability of the defendant. Second and more important, an attorney's statement of his beliefs injects into the case irrelevant or inadmissible matter of facts not legally produced into evidence. By giving his opinion, an attorney may increase the apparent probative force of his evidence by virtue of his personal influence, his presumably superior knowledge of the facts and background of the case, and the influence of his official position. If, for example, an attorney states in his summation that he believes a witness has lied, his statement suggests that he had private information supporting his beliefs. *Id.,* at 401-402 (footnote omitted).

Given the above indisputable analysis of the prosecutor's duty in only a limited segment of our complaints, our views remain adamant. This prosecutor's summation was willfully designed to inflame and prejudice rather than enlighten. It was invalid and violative of the Canons of Ethics, for he was not a witness (although he rightly should have been), he appeared as a representative of the State government. This being so, as was said in *United States v. Berger*, 295 U.S., at 88:

> "It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none."

As to the prosecution's belated assertion that "possibly some of his remarks would have been better left unsaid", it should be noted he could only say possibly. Surely this is a flawed response. For our part, a decent respect for the courts themselves and for the law itself, aside from any defendant's rights, requires that a trial like this one should be declared a nullity regardless even of strong evidence of guilt. See *People v. Steinhardt*, 9 N.Y.2d 267, 173 N.E.2d 871 (1961). This is especially so since to approve the prosecutor's position, the Court must accept the doctrine he proffers—that is, that the fundamentals of a fair trial need not be respected if proof persuades the Court of the defendants guilt. *People v. Alicea*, 37 N.Y. 601, 338 N.E.2d 625 (1975).

In any event, as to the prosecutor's assertion that the case against these appellants was strong, he is doubtless assuming the truth and accuracy of the testimony of Debbie

Spoth (as to Carabbia), and as to the validity of certain inferences as to Cisternino. A constitutional error of the dimension here involved that taints the jury's assessment of the involved issues of fact cannot be regarded as harmless. Hopefully, the Court will agree such is the case here.

II

Since the Court's attention was directed to *Mata v. Sumner* by both counsel, it seems only fair that the Court should also consider on the identification issue still another State Court conviction that was considered in a Federal Habeas Corpus action. Here we refer to *Solomon v. Smith*, 487 F.Supp. 1134 (S.D.N.Y. 1980).

III

For all of these reasons, the Application for Reconsideration should be granted.

Respectfully submitted,

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## APPENDIX E

**State's Answer to Motion for Reconsideration**

(Dated July 23, 1980)

Nos. 39894/39916

IN THE COURT OF APPEALS
EIGHTH JUDICIAL DISTRICT OF OHIO
CUYAHOGA COUNTY

---

STATE OF OHIO,
*Plaintiff-Appellee,*

vs.

RONALD CARABBIA and
PASQUALE CISTERNINO,
*Defendants-Appellants.*

---

ANSWER TO MOTION TO RECONSIDER

Neither defendant has demonstrated that the closing argument of Prosecutor Carmen Marino had any effect whatsoever on any juror. There is no evidence upon which this or any other Court can claim that the closing argument prejudicially affected the jury.

The factual case against each defendant was overwhelming and conclusive of their guilt. Any reviewing court must balance the factual strength of the case against the effect of hot rhetoric, tempered and admonished by Court instructions, and the jury's oath to try the case solely on the facts. It is presumptuous to assume that the average

prudent and reasonable juror was prejudicially swayed by a lawyer's argument without any evidence from the jurors as to how they were affected. It is equally presumptuous to assume that jurors would violate their oaths to be fair and impartial in their deliberations.

The true irony of this case is that it was the State who did not get a fair trial. Parties to the trial were approached by politicians and "friends" in an effort to "assist" the defendants. Numerous potential witnesses, well represented by members of the bar, refused to talk to prosecutors "on advice of their attorneys". Fine, distinguished members of the bar informed prosecutors that their clients would refuse to testify if called. Al Weimer, who sold the bomb car to Thomas Sinito, and who would have singlehandedly convicted Sinito, refused to testify, with no basis because he was not a suspect. The jury bailiff, Sam Trovato, a friend of the defendants (unknown to the State) was priming the jurors to vote not guilty while the evidence was being presented.

It is to be expected, in a case such as this, that defendants, defense attorneys and certain witnesses and persons will band together to circumvent justice. But, it is an outrage when such attempts achieve the extraordinary success as they did in this case.

Possibly some of the statements by Prosecutor Marino would have been better left unsaid, but there is no evidence that those comments prejudicially affected the overwhelming weight of the evidence.

In *Michigan v. Tucker* (1974), 417 U.S. 433, at 446, the Court stated that the law does not require that a defendant receive a perfect trial, only a fair one. The defendants received more than a fair trial. If the State had received a fair trial, all five defendants would have been convicted.

The State moves that the defendants' motion for reconsideration be denied. It is founded only on the rhetorical machinations of brief writers who have failed to recognize the guilt of their clients and the factual strength of the State's case.

Respectfully submitted,

JOHN T. CORRIGAN, *Prosecuting Attorney of Cuyahoga County, Ohio*

By: /s/ CARMEN M. MARINO
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## APPENDIX F

**Supplement to Motion for Reconsideration**

(Dated July 21, 1980)

Nos. 39894 and 39916

IN THE COURT OF APPEALS
EIGHTH JUDICIAL DISTRICT OF OHIO
CUYAHOGA COUNTY

---

STATE OF OHIO,
*Plaintiff-Appellee,*

vs.

RONALD CARABBIA,

and

PASQUALE CISTERNINO,
*Defendants-Appellants.*

---

SUPPLEMENT TO MOTION TO RECONSIDER

In supplementation to the Motion to Reconsider filed herein on July 16, 1980, the following additional submission merits the Court's consideration. The specific reason for this supplement is the granting of Certiorari by the Supreme Court of the United States in the case of *Sumner v. Mata* (see Appendix "A", *infra*).

Here we start with our argument that the identification procedure used by the prosecutor to induce the identification of Ronald Carabbia was improper and deprived Carabbia of a fair trial. This Court (despite the fact that

the only pictures shown the Spoths by *Carmen Marino* were those of the various defendants, whose ages ranged from the low-thirties to the mid-seventies, with the usual appointments that accompany such a range) specifically concluded that among the photographs shown by Marino "were those of five individuals whose physical appearance approximated the description of the men in the back seat given by Mrs. Spoth to the authorities following the explosion" (*Opinion,* p. 40).

Aside from the fact that the Court's conclusion, as set forth above, is inaccurate, totally out of line with all the evidence on this point, and can never be validated (see *Appellants' Brief,* a segment of which is attached hereto as Appendix "B"); a further consideration of critical significance has emerged.

Here we refer to the Court's granting of Certiorari in *Sumner v. Mata* on July 2, 1980. Our attention to this event relates to its publication in the August 16, 1980, *Criminal Law Reporter,* received today (July 21, 1980). As the quoted summary sets forth (Appendix "A"), the Court will deal with the pretrial use of procedures such as those resorted to by Carmen Marino which have not been fully evaluated by this Court. The fact that Carmen Marino did his devilment *during* the trial here involved would surely make the ultimate resolution of our condemnation of this Court's Opinion on the identification issue subject to the thrust of The Supreme Court's eventual decision.

On this point, compare the Federal Appeals Court decision that will be reviewed (611 F.2d 756 [1980]) with this Court's analysis of comparable issues in this appeal.

## CONCLUSION

Even a cursory reading of *Sumner v. Mata* shows the cogency of the arguments rejected by this Court in its published Opinion. The fact that *Mata* involved a State Court conviction that had been approved by the California Courts only to be dealt with by the Federal Courts makes it most unlikely this Court's identification analysis can survive ultimate scrutiny.

Respectfully submitted,

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## APPENDIX G

**Motion for Reconsideration**

(Dated July 16, 1980)

Nos. 39894 and 39916

IN THE COURT OF APPEALS
EIGHTH JUDICIAL DISTRICT OF OHIO
CUYAHOGA COUNTY

---

STATE OF OHIO,
*Plaintiff-Appellee,*

vs.

RONALD CARABBIA,

and

PASQUALE CISTERNINO,
*Defendants-Appellants.*

---

MOTION TO RECONSIDER

I

In all deference to this Court, certain critical aspects in the Opinion released in this cause are unrealistic almost beyond belief. In addition, it is really a "cop out." This is so because the Court, in simply far too many instances, exposes to even a casual reader the fact that, regardless of the cogency of any argument made by the appellants, apparently there was no way *this Court* was going to reverse.

To begin with, the Court's ruling that Carmen Marino's argument was not prejudicial misconduct is really startling.

For it is clear beyond any doubt that this argument was the most reprehensible, and *unprofessional,* ever given in any American courtroom since the prosecutors in the South were compelled to stop calling Blacks "niggers". Thus, for this Court to conclude Carmen Marino only deserved a slap on the wrist would be laughable were it not for the seriousness of the case and of his conduct.

So that the Court understands our assailment of both the Court's Opinion on this subject and of the prosecutor's conduct was meant to be total, our analysis here in quest of a reconsideration starts where the Court's Opinion stops.

At the outset, the Court will surely agree there must be a point somewhere out there where this Court would be required to reverse a conviction and/or do something other than slap the offending prosecutor on the wrists (as was done here) because of an argument made by him. This being so, as it surely must be, the Court's failure to do either here can only be deemed valid if both the Court's findings as to the relevant facts and the Court's application of the law can survive meaningful scrutiny.

*First,* there is the Court's patently erroneous premise that counsel for Cisternino only objected three (3) times and Carabbia's counsel only once. This Court then tortured this asserted "fact" into the absolutely incredible conclusion that their failure to object more often was "indicative that they did not think the bulk of the argument improper at the time" (*Opinion,* p. 61). Aside from being a *non sequitur,* the Court, in making this totally indefensible assertion, must be thoroughly oblivious to the fact that other counsel *repeatedly objected throughout the entire course of the vicious argument* which objections were entered in response to the overwhelming bulk of its contents. All counsel further moved for a *mistrial* because of the argument made. And, the Court has simply chosen to ignore the fact that

it was stipulated *the various objections made by any defense counsel extended to the benefit of all defendants.* (The further fact that the State did not make the ridiculous contention that these appellants waived objections to *any* aspect of Carmen Marino's unethical argument is more than merely enlightening.)

*Second,* the Court oraculates that these gross remarks made by Carmen Marino were not designed to bolster the credibility of the State's witnesses. If this is so, the unanswered question, if such was not their purpose: is the Court saying they had no purpose and, for that reason, had no effect. Apart from the fact that god-like conclusions really have no place in any lawsuit, this Court should have credited the fact that Carmen Marino was not a rookie prosecutor. And, perforce, was aware of this Court's penchant for excusing abusive tactics of this ilk if otherwise convinced the accused was, after all, guilty. Had this consideration been credited, the Court then would have been *compelled* to deal with the irrepressible idea that the prosecutor's resort to the egregious argument made by him in this case was the result of a well-calculated, deliberate, gamble that this Court, at most, would only mildly rebuke him and surely would not break its routine pattern of deeming such arguments, no matter how gross, to be harmless. See *State v. Pitts,* C/A No. 41001.

*Third,* the Court not only grossly misapprehended the impact of Marino's arguments, but also the trial court's responses thereto. If it were otherwise, there is no way this Court could have written that Carmen Marino's abuses were *mere aberrations* (*Opinion,* p. 60). And, just as surely, this Court would not have exonerated the trial judge by using language that camouflaged his abdication to the prosecutor. Here we refer to this Court's inaccurate statement that "for the most flagrant remarks the court gave

curative instructions admonishing the jury to disregard the comments" (*Opinion*, p. 60).

Now, admittedly, which of the countless egregious remarks made by Carmen Marino were the most unethical and unprofessional is surely debatable. But, included in any contest for that distinction would be the following "aberrations" that *were approved* by the trial court:

(1)

"The people we are after are the people involved in organized crime. And these men have put a lot on you in the last two days, trying to shed some doubt in a case where there is none.

Now, *we are not walking into an organized crime case with innocent citizens if we are not absolutely sure that these five men are guilty.*

* * * * *

(2)

Now, one of the major points in this case that shows *we knew what these men were doing we knew that they were planning to kill Danny Greene. They had attempted it before. And they successfully completed the murder of Danny Greene and we couldn't stop it.*

* * * * *

(3)

What I am telling you is that *we knew they were trying to kill Danny Greene and we couldn't stop it.* And if that is an admission of failure, then that is a criticism we have always had with every bombing homicide case in this county.

* * * * *

(4)

. . . [T]*here is not one bit of evidence in this case, with the exception that Sinito worked as a bartender, to make these men in any way decent citizens.*

* * * * *

(5)

We dealt with Fratianno, and we squeezed him, too.

Mr. Yelsky: I will object to this, your Honor.

The Court: *Overruled.*

Mr. Marino: We sat that man down—and he is an old man too, folks. We sat him down, and the agreement was, because he introduced Ferritto to Delsanter he was a part of the conspiracy, *and we gave him the fine choice of sitting right next to his friend Jack White and going to trial in this case, if he thought he was innocent or there was a reasonable doubt,* or to plead guilty to everything, the very charges we have here, taking his five years from Ohio, and he has to testify against the organized crime family in Los Angeles.

* * * * *

(6)

Remember things like Bonnarigo's photograph in Danny Greene's satchel. And Bonnarigo's, Marconi's and Cisternino's fingerprints on a Cleveland magazine at 919 Rondel.

*And since no one has expressed an opinion as to how that mug shot of Bonnarigo got in Danny Greene's satchel, I will express an opinion. I think the law en-*

*forcement community gave it to him. I think they knew he was going to be murdered, or at least an attempt made on his life.*

Mr. Willis: Objection.

The Court: *Overruled.*

Mr. Marino: And they gave him as much protection as they could.

* * * * *

(7)

. . . [o]nly criminals know about organized crime. Only murderers know what goes on in this society.

And when they try to tell you that it is a fictitious organization, folks, *there are certain things that each person knows about his own background.* No matter where you come from, no matter what your ethnic background is, *you know there are certain things peculiar to your background.*

*And [as an Italian] I can tell you this, that the organization is not fictitious. They determine what the membership is, and it is quite obvious. And that is not an ethnic slur.*

These people are a monkey on the back of society folks. *These people are murderers.*

* * * * *

(8)

And all of a sudden we charge these people with engaging in organized crime, because their gambling is on such a high level that it corrupts society, that *they get to the judges, the prosecutors, yes, and the police.*

Mr. Willis: *Objection, your Honor. There is no evidence on that.*

The Court: Overruled.

Mr. Marino: That stinks. And *it is not brought out in the courtroom, because we, the law enforcement community, have been quite inept over the last 90 or 100 years in getting these people to trial.*

* * * * *

(9)

Mr. Marino: Well, let's look at it from the standpoint of other criminals in this case. Obviously, John Calandra has done much more in this case than anyone else. Why don't they pin it on John Calandra, Licavoli's right hand man? The man who interceded between all the other individuals connected with this case. Why don't they put the rap on him?

Because he's in jail with them, folks. That's why. He is right across the hall here.

Mr. Willis: Objection your honor. *There is no evidence of that.*

The Court: *Overruled.*

* * * * *

(10)

But let's face it, folks. Were they put in a dilemma? They claimed they didn't know anything about it. But yet counsel for Mr. Cisternino not only defends his own client, but he defends Jack Licavoli over there. They claim they didn't know the positions of the men in the car. Well, *that's a lie right there.*

Mr. Sperli: *Objection.*

The Court: *Overruled.*

Mr. Marino: Their only problem was, ladies and gentlemen, *those attorneys couldn't tell us that without admitting their clients' complicity.*

Mr. Willis: Objection.

Mr. Sperli: Objection. Absolutely—objection.

The Court: *Overruled.*

Mr. Marino: *This is not a search for the truth. That's the most utterly ridiculous statement I ever heard, whether it came from a prosecutor or a defense attorney.* If this were a search for the truth, ladies and gentlemen it would be an investigation, and everyone who knows anything about it would cooperate, come forward and make statements.

* * * * *

(11)

Then I ask you this. The first person you vote on, you vote on Carabbia. *Because we are 100 per cent sure, from the time we knew he was involved in the—and that was before Mr. Ferritto made his statement,* because we had the toll record of every defendant pulled in this case before Ferritto turned State's evidence.

Mr. Policy: I am going to object to that, because there was no evidence to that effect.

The Court: The jury will rely on its recollection concerning the evidence."

(*Appellants' Brief,* pp. 63-66. [Emphasis supplied].)

II

While the Court may still insist, as it indicates in its Opinion, that these unethical remarks by Mr. Carmen Marino constituted "a rather brief, unfortunate performance during a long closing argument" by him (*Opinion*, p. 60); our analysis of the entirety of his summation conclusively shows that neither the abuses delineated nor the argument itself were brief. In fact, the abuses dominated more than two-thirds of his argument. But, even this is not all. Equally indefensible is the Court's arbitrary proclamation that "for the most flagrant remarks, the Court gave cautionary instructions" to the jury (*Opinion*, p. 61). This is so because nothing, absolutely nothing, that the trial court told the jury to disregard was (or could possibly be) as *unpardonable* as any one of the segments numbered ¶¶1, 6, 7, 8, 9, 10 and 11 as indicated above. This is so because none of the remarks the trial court told to the jury to disregard could possibly be as manifestly prejudicial as the above litany of things the trial court affirmatively authorized the prosecutor to tell the jury, as this judge did. Here, we refer to the fact that the trial judge approved of the prosecutor telling that he and the various enforcement agents involved in this case in investigating and prosecuting the charges "were absolutely sure" Carabbia and Cisternino were guilty (¶1); that they knew *before* Danny Greene was killed that the defendants were planning to kill Danny Greene and that the defendants had tried to kill him before (*ibid*); that his "opinion" (—that is, Marino's) was that the police "knew . . . [Greene] was going to be murdered, or at least an attempt made on his life" (¶7); that the reason the defendants did not try to pin the crime on Calandra was because he was "in jail with them" (¶9).

Surely the Court will agree the above analysis thoroughly confutes this Court's expressed belief that the trial

judge directed the jury to disregard *the most flagrant* of the prosecutor's unethical remarks. For each and every one of those referred to above were far more flagrant violations of the prosecutor's ethical duty than any one (or the cumulative effects of all) of the various comments the jury was told to disregard.

But even this is not all—a total decimation and annihilation of the Court's point in this regard is furnished by the following segment of the Record (¶10 above). This segment is set forth again for emphasis since the Court had to have missed it when it made the statement being aggressively assailed by us:

> By Mr. Marino: But let's face it folks. Were they put in a dilemma? They claimed they didn't know anything about it. But yet counsel for Mr. Cisternino not only defends his own client, but he defends Jack Licavoli over there. They claim they didn't know the positions of the men in the car. Well, *that's a lie right there.*
>
> Mr. Sperli: *Objection.*
>
> The Court: *Overruled.*
>
> Mr. Marino: Their only problem was, ladies and gentlemen, *those attorneys couldn't tell us that without admitting their clients' complicity.*
>
> Mr. Willis: Objection.
>
> Mr. Sperli: Objection. Absolutely—objection.
>
> The Court: *Overruled.*
>
> Mr. Marino: *This [trial] is not a search for the truth. That's the most utterly ridiculous statement I ever heard, whether it came from a prosecutor or a defense attorney.* If this were a search for the truth,

ladies and gentlemen it would be an investigation, and everyone who knows anything about it would cooperate, come forward and make statements.

It is our view that the above segment of Carmen Marino's argument was the most flagrantly prejudicial ever given in any American courtroom. Nothing could possibly be worse than for a prosecutor (any prosecutor) to argue that the defendant's *own counsel* believes he is guilty. Simply to say the unavoidable thrust of the above isolated argument violated the most essential aspects of a fair trial should have sufficed, since it's true. However since it so obviously violated the right of counsel, this Court's selection of other aspects of Marino's argument as being more flagrant makes the Court's harmless error conclusion all the more defective. For it is certain, if something worse had been said and was properly excluded (as this Court states) by the trial judge, then the mere making of such remarks should have incurred the extreme wrath of the Court in addition to a reversal. But again, nothing that was excluded could be worse, and nothing was worse, than the prosecutor's remarks set forth above that were not excluded by any cautionary instruction.

## III

As to the Court's efforts to distinguish away the cases of *Berger v. United States* and *United States v. Garza* in the context of the conclusion that Marino's remarks were not of the same character (*Opinion*, p. 61); the Court's reliance on evidence it regarded as both direct and circumstantial as support for this thesis seems ill-advised. For not only was the testimony of Ferritto and Aratari highly suspect, the irreconcilable conflicts therein and the fact that their evidence was totally rejected as to Licavoli mirrors only a feature of this so-called *direct* evidence. The testimony by the Spoths, influenced as it was by the

prosecutor here in such an unconscionable way, is hardly the type of *direct* evidence that would dilute the impact of the argument made here by Carmen Marino. And, of course, the Court's conclusory statement about strong circumstantial evidence insofar as Carabbia is concerned is equally flawed, as no such animal exists in this case—that is, strong circumstantial evidence.

This case then presents the Court still another opportunity to correct a grievous flaw in the trial tactics of most of our local prosecutors, especially the chief prosecutor in this case who was quite willing to pay the price of the weak admonition given him in exchange for the "foul blows" struck by him in the name of the State in his quest for these convictions.[1]

For our part the prosecutor's remarks, including his characterizations of defense counsel, were so malicious that his actions constituted prejudicial misconduct. This being so, especially when coupled with the justification for his resort to this type of an argument (as made in the State's *Answer Brief*), makes this Court's rejection of our contentions in this regard truly indefensible. If that were all, such would be more than enough to require a reconsideration of the Court's announced position. But, even more serious factors are present here.

On this latter point, and this idea has been repeatedly argued before, this Court has a responsibility to protect those accused of crimes from the types of prosecutorial excesses and judicial indifference perpetrated against these appellants. This is especially so when it occurs with the *expressed* approval of the trial judge. This duty is hardly

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1. Apparently the most the Court could bring itself to say in criticism of this prosecutor was that while the Court did "not condone" the prosecutor's remarks, his conduct was not so reprehensible as to deprive appellants of a fair trial.

fulfilled when the Court makes it clear, as it apparently does here, that for its part the fundamentals of a fair trial need not be respected by our prosecutors and trial judges if there was any proof in the Record that somehow persuades the Court that the accused was, in any event, guilty.

## CONCLUSION

The bottom line of the Court's expressed Opinion seems to be that because the trial judge told the jury on six (6) occasions to disregard certain of the wrongs committed during the prosecutor's almost thirty-seven (37) pages of summation, he should be given absolution since these appellants were, after all, guilty. Further, that despite the fact that more than *forty-three* (*43*) objections in all were made by defense counsel during the course of Carmen Marino's 37-page argument; his specific attacks on counsels' integrity and his open assault on the appellants' right to the effective assistance of counsel were mere *aberrations*. The same being true of his direct and specific expressions of opinions on the appellants' guilt and his blatant excursions outside the Record.

For our part, the arguments which were subject to the given cautionary instructions were so egregious as to be incurable by the corrective instructions that were given in those isolated instances. This is especially so once the prosecutor made his direct appeal to ethnic prejudices. See *Commonwealth v. Graziano,* 331 N.E.2d 608 (1975).

On the other hand, the prosecutor's argument in the other areas which had the actual approval of the trial judge makes it clear that sooner or later a court, hopefully this one, will require the State to pay the price of reversal

for having tolerated the atmosphere, under which this prosecutor was willing to gamble, there was nothing he could possibly say in final argument which would result in this conviction being reversed.

While we concede our expressed views have been most critical of the stance taken by this Court, it has been done because we agree with the late Justice Felix Frankfurter that:

> "Judges as persons, or courts as institutions, are entitled to no greater immunity from criticism than other persons or institutions. . . [J]udges must be kept mindful of their limitations and of their ultimate public responsibility by a vigorous stream of criticism expressed with candor however blunt."

In addition, this Court should consider *People v. Weathers*, 6 Ill. App. 3d 114, 338 N.E.2d 880 (1975), where the prosecutor charged defense counsel with lying, as did Carmen Marino in his summation (and a different prosecutor in *State v. Pitts, supra*). The *Weathers* court, contrary to the position taken by this Court here and in *Pitts*, concluded in unequivocal language that such tactics were grossly prejudicial. Also in *Weathers*, the court credited the fact that the action of the prosecutor was not inadvertent. See also *People v. Kane*, 393 N.Y.S. 2d 439 (1977) (prosecutor stated legal aid attorney did not believe his client was innocent); *Russell v. State*, 532 S.W.2d 268 (Tenn. 1976) (error to attribute to counsel fabrication of insanity defense).

Our view is that it is not without significance that this Court's released opinion contains no reference whatsoever to the personal attacks made on appellants' counsel during the course of the prosecutor's peroration. The fact

that these attacks, as the Record set forth above clearly shows, were made with the *expressed approval of the trial court who rejected defense objections* surely deserved individualized consideration. This is especially so since a prosecutor's summation can produce a constitutional error. See *Donnelly v. DeChristoforo,* 416 U.S. 637 (1974).

Also, the Opinion here very probably is the first in recent times to actually approve, as actually this is what the Court's Opinion does, a prosecutor expressing a personal opinion or belief, not only for himself but for all of the enforcement officers engaged in any aspect of the case, in the guilt of those accused. This is particularly so when such the Opinion is expressed, as it was here, in a manner showing it to be based on his public position. In the usual situations such an argument literally guarantees a reversal of conviction (*United States v. Gonzalez,* 558 F.2d 631 [1st Cir. 1977]; *United States v. Splain,* 545 F.2d 1131 [8th Cir. 1976]; *State v. Monroe,* 236 N.W.2d 24 (Iowa 1975); *Commonwealth v. Gilman,* 470 Pa. 179, 368 A.2d 253 [1977]; *Commonwealth v. Maloney,* 469 Pa. 342, 365 A.2d 1237 [1976]; *Elizondo v. State,* 545 S.W.2d 453 [Tex. Crim. 1976] [the prosecutor also had taken the stand as a witness]).

Finally, as to the efficacy of the curative instructions given by the trial court to correct any of prejudicial excesses in the prosecutor's argument, the statement made in *United States v. Rudolph,* 403 F.2d 805 (6th Cir. 1968), another case tried in Cleveland, seems especially apt. Here it was stated (in a case where, unlike what happened here, the jury was specifically instructed as to all the wrongs there involved) that it must be remembered that the withdrawal of the saber still leaves the wound (*id.,* at 806).

To be sure then, while this Court may very well maintain its previously expressed position, for our part, "if you throw a skunk into the jury box" as was done by Carmen Marino, it makes no sense to instruct the jury not to smell it or to say they did not smell it. *Dunn v. United States,* 307 F.2d 883, at 886 (5th Cir. 1962). It makes even less sense to tell a jury it is alright to smell the skunk and then conclude its smell nonetheless had no effect on their ability to detect and correctly identify the fragrances of the other odors present.

Again it is hoped that this Court will view our vigorous criticisms of its earlier Opinion in the sense it was intended. In any event, we fully subscribe to the idea expressed by still another giant in our profession, Harlan Fiske Stone, who wrote:

> "I have no patience with the complaint that criticism of judicial action involves any lack of respect for the courts. When the courts deal, as ours do, with great public questions, the only protection against unwise decisions, and even judicial usurpation, is careful scrutiny of their action and fearless comment upon it."

For all of these reasons, this case should be reconsidered and reversed.[2]

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2. Although this Application only deals with the Court's response to our contentions that Carmen Marino's summation was so unethical, egregious and reprehensible that it deprived these appellants of a fair trial, we do not in any way lessen our resolve as to other objections to the flawed responses made by the Court insofar as our other Assignments of Error are concerned.

Respectfully submitted,

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## APPENDIX H

**Journal Entry and Opinion of Ohio Court of Appeals**

(Dated July 10. 1980)

No. 39894 and 39916

COURT OF APPEALS OF OHIO
EIGHTH DISTRICT, COUNTY OF CUYAHOGA

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STATE OF OHIO,
*Appellee*

vs

PASQUALE CISTERNINO (No. 39894) and
RONALD CARABBIA (No. 39916)
*Appellants*

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JOURNAL ENTRY AND OPINION

STILLMAN, *J.*:

This cause came on to be heard upon the pleadings and the transcript of the evidence and the record in the Common Pleas Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Common Pleas Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

On December 5, 1977, defendants-appellants Ronald Carabbia and Pasquale Cisternino were named as defendants in a five-count indictment. Named as codefendants

were James Licavoli (aka Jack White), John Calandra, Angelo Lonardo, Alfred Calabrese, Thomas Sinito, Raymond Ferritto and James Fratianno. The indictment alleged that the defendants had conspired to murder and did murder Daniel J. Greene on October 6, 1977 by aggravated arson and for hire in furtherance of an organized crime venture, in violation of R.C. §§ 2903.01, 2909.02, 2923.01 and 2923.04. Defendants Ferritto and Fratianno entered guilty pleas; Calandra's case was severed for health reasons. The two conspiracy counts were nolled by the State.

The trial of the case against the remaining six defendants commenced on March 29, 1978, following more than a month of jury selection and motion hearings, on charges of aggravated arson, aggravated murder and engaging in organized crime against all six. Defendant Calabrese's motion for judgment of acquittal was granted following the presentation of the State's case. The jury returned verdicts on May 25, 1978. Appellants Carabbia and Cisternino were found not guilty of engaging in organized crime and the aggravated murder specification of murder for hire, but guilty of aggravated arson in violation of R.C. § 2909.02 and guilty of aggravated murder with the specification of aggravated arson in violation of R.C. § 2903.01. Verdicts of not guilty were returned as to all the counts against defendants Licavoli, Lonardo and Sinito. Appellants were sentenced to life imprisonment for aggravated murder and concurrently to from seven to twenty-five years confinement for aggravated arson.

The following is a synopsis of key testimony presented at trial, especially as it relates to appellants.

Daniel J. Greene died as a result of injuries sustained when a bomb placed in a car parked next to his vehicle exploded. The incident occurred at 3:00 p.m. on October 6,

1977 in the parking lot at Brainard Place in Lyndhurst, Ohio, where Greene had just concluded a dental appointment. He was about to enter his Lincoln when the red 1970 Chevrolet Nova parked next to his car exploded, a dynamite bomb inserted in the Nova door having been detonated through the use of a remote control device.

Suspicious activity was observed at or near the Brainard Place parking lot before the explosion. Thomas Schmenk, a Lyndhurst fireman, was checking fire hydrants at the scene at approximately 2:30 p.m. when he observed a dark blue or purple Mercury Marquis or Plymouth Fury being slowly driven around the parking lot. The automobile's occupants, dark-haired men in their late 40's, were looking around. The car pulled into traffic shortly before the fire vehicle.

Debbie and Gregory Spoth were driving east on Cedar Road, about to turn north (left) onto Brainard Road. Directly across from them in the opposite westbound lane, they observed a 1973 or 1974 blue Plymouth rolling to the corner, also about to turn north (right) onto Brainard Road. There were two men in the Plymouth, the passenger sitting in the back seat. The driver was in his forties, had salt and pepper colored hair, and was not a large man; Mrs. Spoth recalled that he had a thin face and looked Italian. The man in the back seat was larger, heavier set, dark complexioned, with a receding hairline and, according to Mrs. Spoth, also looked Italian. The Plymouth hesitated in executing the turn onto Brainard so Mrs. Spoth turned left onto Brainard first and the Plymouth followed. Almost immediately after turning, the explosion occurred at Brainard Place to the Spoths' right and Mrs. Spoth momentarily stopped the car. With debris flying toward her car, she then moved ahead. As the blue Plymouth passed her, the occupants faced the

Spoths and looked toward the direction of the explosion. A short distance north, Mrs. Spoth drove her car onto Interstate 271; ahead the Spoths observed the blue Plymouth again but only one occupant was seen. Both noted that this seemed strange and Mr. Spoth wrote down the license number, Pennsylvania No. 2F1023, before the Plymouth exited off the Interstate 271 highway.

That evening, the Spoths called Mrs. Spoth's father, Arthur Volpe, a Berea policeman, who contacted the Lyndhurst Police Department. The Spoths were shown several sets of photographs over the following weeks and both identified photographs of Raymond Ferritto as the driver of the blue Plymouth. From a photograph array on February 16 and at trial Mrs. Spoth identified Ronald Carabbia as the passenger in the back seat.

At trial, Raymond Ferritto described his role in a plot to murder Daniel Greene. On October 6, 1977, having been provided with information that Greene had a dental appointment at Brainard Place, Ferritto and Carabbia arrived at the parking lot at 2:00 p.m. to wait for Greene's appearance. Carabbia was in the red Nova and Ferritto in the blue Plymouth. Two others, one of whom was known to Ferritto as Tony, were to attempt to shoot Greene on his arrival. If they were unsuccessful, Ferritto and Carabbia were to park the Nova next to Greene's car, place a dynamite bomb which Cisternino had assembled in the Nova's door and detonate it from outside the lot by a remote control device located in the back seat of the Plymouth when Greene was entering his automobile to depart. As the others did not attempt to shoot Greene when he arrived, Ferritto drove the Nova into the parking space next to Greene's automobile and placed the bomb. They drove out and Carabbia observed Greene's Lincoln from a phone booth at the corner. When Greene left the medical building and approached his car, Carabbia

got into the back seat and the bomb was detonated as Ferritto drove away.

Ferritto described in detail the evolution of the plot to kill Daniel Greene from the time he first became involved in the spring of 1976. James Fratianno, who lived in California but was visiting Warren, Ohio, called Ferritto in Erie, Pennsylvania, and said he wanted to talk to him. They met the next day in Warren; Fratianno said there were problems in Cleveland and there might be some work for Ferritto. Ferritto understood this to mean Fratianno wanted somebody killed. Fratianno thought Ferritto should talk to Tony Del Santer. A couple of weeks later, Ferritto met with Del Santer following introductions by Fratianno. Del Santer explained that John Nardi and Greene were trying to "muscle in" on Cleveland's gambling operations and they had to be eliminated. In response to Del Santer's query, Ferritto asked what was in it for him. Del Santer said he would talk to Jack White (Licavoli) and get back to Ferritto.

Carabbia called him two or three weeks later and they arranged a dinner meeting in Warren. In attendance were Licavoli, Del Santer and Cisternino as well as Carabbia and Ferritto. Licavoli said Ferritto would be taken care of with money or would be made a member of "The Thing" or "The Organization". Cisternino would do the groundwork on Nardi and Greene, Ferritto would be contacted later.

In November of 1976, not having heard anything, Ferritto called Carabbia. Carabbia said he would get back to him. In April of 1977, Ferritto again called Carabbia and said he wanted to set up a meeting to find out the status of the contract. Ferritto had heard of attempts on Nardi's life and thought the deal was off. In April, Ferritto attended a meeting with Del Santer, Carabbia, Cisternino and Calandra. Ferritto was told by

Del Santer and Calandra the "arrangement" was "still good". They were having problems determining Nardi's and Greene's schedule as both were erratic.

During the summer of 1977, Ferritto made a number of trips to Cleveland. He talked with Cisternino who gave him information about Greene. Cisternino showed Ferritto the places Greene frequented.

In May of 1977, after John Nardi's death, Cisternino and Calabrese came to Erie in two cars and asked Ferritto if he wanted the blue Plymouth. He was given the necessary papers to transfer title. At that time, Cisternino and Calabrese told him of their two unsuccessful attempts on the lives of Greene and Nardi. Ferritto transferred title to a "fictitious" Guy Mitchell and secured Pennsylvania license plates for the blue Plymouth through the assistance of friends and acquaintances.[1]

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1. There was testimony and documentary evidence presented tracing the ownership of the 1973 blue Plymouth which Ferritto used as the "getaway car". The vehicle was originally an Ohio Highway Patrol car which had several subsequent owners. Joseph Sandora, Jr. of Girard, Ohio, bought it from the Niles Bank which had title as a repossessed car. According to Mr. Sandora, he painted it blue and placed it in front of his shop with a "For Sale" sign on it. Two men drove up between Christmas and New Year's Day of 1976 in a large Buick and a man who introduced himself as John or Joe Demar from Maple or Mayfield Heights purchased the car for $250. Sandora said he signed the title, gave it to Demar and one of the two drove the car away. The title was "notarized" by Carl Bispeck, a notary and insurance agent. Bispeck testified and a handwriting expert verified that Bispeck's signature was forged. Bispeck stated he was the insurance agent for Ronald Carabbia's brother Angelo, had insured Angelo's vending machine business and issued homeowner's insurance to the two Carabbia brothers' wives. A "Patrick Rich" was designated as buyer and title issued in his name. An Ohio license plate sticker was later issued, on May 24, 1977, to "Patrick Rich" in Mayfield Heights, Ohio, by the Ohio License Bureau. This was the same date that a sticker was issued to "Harry Rollins", the unknown owner of the 1970 Nova later used as the "bomb car". The clerk who issued both stickers testified that based upon the numerical sequence of the stickers, it seemed likely one person had secured both stickers. "Patrick Rich" of Cleveland then sold the Plymouth to "Guy Mitchell" of Erie, Pennsylvania, according to the titles.

In August of 1977, Ferritto met with Licavoli and Del Santer in Warren and complained that he had to use his own money and transportation and was not receiving much assistance from others. The following week Del Santer died. Ferritto, Fratianno, Licavoli, Calandra and Cisternino attended the wake in Warren and had dinner at a local restaurant. There they discussed the plan. Licavoli told Ferritto if he needed anything to discuss it with Calandra; Ferritto said he needed money for expenses. A few days later he received $5,000 from Carabbia. Licavoli told him that after this was all over, if Ferritto would go to Detroit, he would "make" him (accept him as a member of "The Organization"); Ferritto would receive 25% of "what was coming out of Warren and Youngstown", which Ferritto understood to mean gambling receipts.

Toward the end of August, 1977, Ferritto and Cisternino met at a Cleveland motel. Cisternino had two tape cassettes he wanted Ferritto to hear. After the Del Santer funeral, Licavoli and Calandra had said they would be receiving tapes from a wiretap on Greene's phone and Cisternino said these were the tapes. Cisternino tried to play the tapes on a player Ferritto had purchased at Uncle Bill's but they were all garbled; Cisternino said he would see a man named Marconi to see if he could correct the problem. A week later, Ferritto returned to Cleveland. Cisternino had more tapes which Cisternino said he had received from Lonardo through Sinito.

In September, 1977, Cisternino and Ferritto made an abortive attempt to kill Greene through use of a "bomb box". Cisternino obtained a steel box with an open side and four railroad spikes as legs. Ferritto and Cisternino placed the box near the front door of the apartment building where Greene lived. Near the box a plastic bottle

filled with nails and a flammable liquid was placed. Their intention was to put a bomb in the metal box later and place the bottle of nails and liquid in front of the bomb; when Greene would come within range of the box, the bomb would be detonated blasting the nails and liquid at him. Ferritto went back the next day but did not place the bomb in the box as there were too many elderly persons who could be injured in and around the building. Ferritto did not know what happened to the steel box or plastic bottle. The latter part of September, Ferritto met with Cisternino and Calandra. Ferritto said he was not receiving any information so was returning to Erie and was going to forget about the Greene matter for a while. As he was leaving, Ferritto saw Sinito who tried to dissuade him from departing.

The first Monday in October, Carabbia called and said they should meet the next day in Struthers, Ohio. They met at the vending machine company Carabbia and his brother owned. The two drove to Mosquito Lake near Warren. Calandra, Licavoli, Cisternino and Lonardo were there. They met on a docked boat owned by somebody named "Doc" from whom either Licavoli or Calandra had gotten the keys. A tape was played that revealed Greene's girl friend had made a dental appointment for him for 2:30 p.m. on Thursday, October 6. Greene had personally confirmed the appointment. The group decided to try to kill Daniel Greene; they discussed use of a rifle or bomb. Earlier, Ferritto had met a Tony who along with a friend was supposed to help in the killing of Greene through the use of a high-powered rifle.

After the Mosquito Lake meeting, Ferritto went back to Erie, picked up some personal effects and went to Cleveland the next day. He met Cisternino at a motel parking lot and went to an apartment building with a

fountain at the entrance and ascended to apartment 333. Cisternino had a key; he said the apartment was occupied by a friend who was not using it. Carabbia arrived and the two stayed overnight. Cisternino left and returned the next morning with a shopping bag containing a police radio and components for a bomb: dynamite, a dynamite cap, a battery, switches and a remote control device. Cisternino assembled the bomb within an hour with some assistance from Ferritto who supplied black electrical tape he had purchased at Gold Circle the day before. Cisternino showed Ferritto a red Nova in the parking lot downstairs and said that it was the car which was going to be used. It had a box welded on the passenger door where the bomb was to be placed. At 1:00 to 1:30 p.m., Carabbia and Ferritto left, in the Nova and Plymouth respectively, to meet at Brainard Place. Cisternino remained at the apartment to monitor the success of the venture on a police radio. After the explosion, Carabbia and Ferritto returned to apartment 333 where Cisternino said he had not heard anything on the radio. Carabbia and Ferritto left at the same time, Ferritto returning to Erie.

Carabbia called him two days later and said he had heard that a blue car had been seen leaving the scene of the bombing. Ferritto had the Plymouth painted brown and gave it to his nephew. About ten days after the bombing, Cisternino and Ferritto had dinner together at a restaurant in Warren. Licavoli was in the bar; they discussed Ferritto's compensation for killing Greene.

The F.B.I. searched Ferritto's home at the end of October. Ferritto contacted Carabbia and told him he needed an attorney. Carabbia gave him $5,000. Ferritto was arrested, confessed to his role in the murder of Greene and agreed to testify in exchange for a reduced sentence.

Louis Aratari testified as to his role in killing Greene. He and his friend Vic Guiles were supposed to shoot Greene when he drove into the Brainard Place parking lot, but failed to do so and left before the bombing. Aratari was first approached about the plan to kill Greene in August of 1977, and he later talked to Anthony Liberatore about it. About ten days before the Greene murder, Liberatore asked him to come to a Ramada Inn motel room where he met Calandra, Cisternino, Carabbia and Ferritto. Carabbia and Ferritto needed help and the group discussed different ways of killing Greene. Four days to a week later, Carabbia summoned Aratari to the motel again. Carabbia, Ferritto and Cisternino were there; he thought Calandra was there for a short time. Vic Guiles came to this second meeting. Under instructions he and Guiles had obtained a scope rifle at an Arthur Murray Dance Studio some weeks before. Three or four days after the second meeting, Aratari received a telephone call from Carabbia informing him of a lead they had on Greene: Greene had a dental appointment the next afternoon at Brainard Place. Aratari and Guiles looked over Brainard Place the next morning and then met Carabbia and Ferritto there that afternoon. Guiles, supposedly a rifle expert, was sure he could hit Greene when he entered the area. Ferritto and Carabbia wanted to use the bomb car if Greene parked next to an empty parking space. But if Greene parked between two cars, Aratari and Guiles were to shoot him. Aratari and Guiles waited in their car for thirty minutes; Guiles became edgy, thinking somebody was watching them, and moved the car. While doing so, Greene drove in. Carabbia was angry that the two had missed Greene and announced that he and Ferritto were going to use the bomb car. Ferritto told them to leave. They left and returned briefly to see Ferritto placing the bomb car next to Greene's. Aratari returned again after

the explosion to observe emergency vehicles on the scene. He called Kenneth Ciarcia and reported "the hit was made". As payment Aratari had been promised he never would have to worry about money again and was promised "to work" a barboute game with Cisternino. He received about $5,000 from Thomas Lanci after the killing, $2,000 of which he gaves to Guiles. A couple of days after the crime, Lanci took him to a Diamond's Men's Store and outfitted him with $2,000 worth of clothes. After his arrest Aratari agreed to testify in exchange for a reduced sentence.

The State presented other evidence which substantiated Raymond Ferritto's account of various activities engaged in by him and others in furtherance of the plan to end Greene's life. The following is not an exhaustive description of that evidence.

On November 14, 1977, the management of the apartment building at 15500 Lake Shore Boulevard, where Greene had resided, found a metal box and a plastic bottle containing flammable liquid and nails near the entrance of the building. These articles were turned over to the police. Testing revealed that the liquid in the bottle was paint thinner. A search of apt. 333 at the Winchester Hills Apartments in Willoughby Hills, Ohio, which the F.B.I. determined to be the apartment where Ferritto spent the night of October 5 from his description of the building, revealed a can of Mr. Thinzit paint thinner in the kitchen. Chemical analysis revealed that the Mr. Thinzit thinner had the same structural content as the paint thinner in the plastic bottle found at Greene's apartment building.

Ferritto testified as to his understanding that Greene's activities had been monitored by electronic surveillance and to having heard a tape of a telephone conversation where a dental appointment for Greene was made. In

the office of the apartment building at 15500 Lake Shore Boulevard, the telephone terminals for all the apartments in the building were located. The December 19, 1977 search of the office revealed no wiretap on Greene's telephone. The terminal chamber to Greene's apartment, No. 619, had small scratches on it. Found in an office cabinet was a telephone from which the transmitter had been removed; the unit could be used only for monitoring. Alligator clips, a telephone shoulder rest, cables and a lineman's pliers were also found in the management office.

Defendant Thomas Sinito was a business associate of the building's managers, Elliott Guttenplan and Lloyd Mendes; the three of them operated an amusement park in Pennsylvania. Sinito was known to have visited Guttenplan and Mendes at the 15500 Lake Shore Boulevard address on occasion, both before and after Greene's death.[2]

According to Ferritto, when he and Cisternino met at a Cleveland area motel at the end of August, 1977, Cisternino attempted to play two tapes which he had brought with him. Ferritto had purchased a tape recorder. The tapes were garbled and Cisternino said he would contact Marconi to see if he could correct the problem. Carmen Marconi was observed at defendant Licavoli's house in Pepper Pike on October 10, 1977 after an F.B.I. wiretap of Licavoli's house was discovered by Paul Ciricillo who also lived at the residence; an F.B.I. agent observed Marconi climb a telephone pole adjacent to the Licavoli residence with a telephone lineman's test set and trace a wire to a

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2. After Greene's death, on October 28, 1977, Guttenplan, Mendes and defendants Lonardo and Sinito were observed together by an F.B.I. agent at the Village Square Shopping Center in Pepper Pike, Ohio. They were followed to Crestmont Cadillac.

Sinito and Carabbia were observed together by an F.B.I. agent at a Holiday Inn on Route 8 on November 1, 1977 and at a restaurant in North Lima on November 4, 1977 and later that day at a Ramada Inn in Liberty.

house across the street. On February 7 and 8, 1978, the F.B.I. searched Carmen Marconi's 24701 Lake Shore Boulevard residence and 2628 East 112th Street place of business, respectively. Various electronic devices were seized including a telephone tester which could be used to monitor without affecting a circuit and a device identified as a voice activated relay. An F.B.I. agent with the Technical Services Department demonstrated that a completely automatic system could be set up to monitor telephone conversations emanating from Greene's apartment through a combination of equipment seized in the Marconi searches and the search of the manager's office at Greene's apartment building.[3]

The business records of various Cleveland-area hotel and motel managers verified that Ferritto stayed at the establishments in question at the times testified to by Ferritto. Besides meeting Cisternino in motels, Ferritto testified that he met Cisternino at a house on "Kipling Avenue", the residence of a friend of Cisternino's where Cisternino sometimes stayed. From Ferritto's description and further investigation, the F.B.I. determined that Ferritto met Cisternino at the upstairs apartment at 919 Rondel, on the corner of Kipling Avenue, an apartment listed to Donald C. Ready. From that address telephone calls were made to Ferritto's home in Erie, Pennsylvania. A search of the 919 Rondel apartment was conducted by the F.B.I. on February 6, 1978. Found there were two copies

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3. Also found in the Marconi searches were: a copy of an April, 1977 edition of Cleveland Magazine which contained an article on Cleveland bombing figures, a list in Marconi's handwriting showing the radio frequencies used by various law enforcement agencies, a list of frequencies for communications between F.B.I. agents, Marconi's personal phonebook which contained a code number used by the phone company to determine what line a particular phone is on, three letters linking Cisternino and Marconi, a receipt for a Bearcat scanner and an advertisement for a voice activating tape recorder.

of the April, 1977 edition of Cleveland Magazine containing an article on Cleveland bombing figures. The article in one of the magazines revealed fingerprints identified as those of Cisternino and Calabrese. The other article had Cisternino's prints. Also seized was a list of police and F.B.I. radio frequencies, electronics equipment, including a VHF monitor receiver, guns and ammunition and a motel key bearing the room number of a room in which Ferritto stayed during one of his visits. A paper bearing, among others, the license plate number and description of an automobile registered to the wife of Keith Ritson, an associate of Greene's, was also seized.

On December 5 and 13, 1977, the F.B.I. searched apartment 333, Winchester Hills Apartments in Willoughby Hills, listed to Zoltan Kalman. The F.B.I. had determined from Ferritto's description and further investigation that it was the apartment where, by Ferritto's account, he and Carabbia spent the night before Greene's death and where Cisternino built the bomb on the morning of October 6. Among the items discovered were electrical wire and electrical tape found to have one of Ferritto's fingerprints on it. Also seized in the apartment was a Tennelec Memory Scan (police scanner) manual on which was Cisternino's fingerprint.

Telephone company records of calls placed from residences of certain alleged participants substantiated Ferritto's account. Investigation linked a boat at Mosquito Lake, described as the meeting place days before the bombing, to Dr. Robert Sabatini.

A substantial quantity of other evidence linked various defendants to the murder of Daniel Greene. Again there is no attempt exhaustively to describe the evidence presented.

The automobile which exploded, killing Greene, was a red 1970 Chevrolet Nova which had been sold to Dealer's Outlet, a used car agency, in January, 1977. Dealer's Outlet business records did not reflect that the car had ever been sold; however, a certificate of title issued for the Nova indicated that the car had been transferred to a "Harry Rollins" of Cleveland. The signature of Roger L. Wood, a notary, appeared on the title, registration application and power of attorney authorizing Albert Weiner, owner of Dealer's Outlet, to make application for title. Roger L. Wood, an employee of Dealer's Outlet, testified his notary signatures were forged. An F.B.I. handwriting expert determined Wood's signature had been executed by Albert Weiner. "Harry Rollins" could not be located at the address given on the title transfer documents; handwriting analysis revealed that two of his signatures had also been executed by Weiner. Several witnesses testified that Weiner was a friend of defendant Sinito who had been seen at the used car lot on several occasions. An Ohio license sticker was issued to "Harry Rollins" by a Mayfield Heights license bureau clerk on May 24, 1977. At the same time, the clerk issued a sticker to "Patrick Rich", the designated owner of the blue Plymouth which Ferritto drove away from the scene of the Greene bombing; the stickers were in sequence. "Harry Rollins" was the owner of the Nova at the time of the bombing in which the car was destroyed.

Louis Aratari, who revealed his participation in the bombing, purchased a 1975 Mercury used on October 6 from Kenneth Ciarcia at Cross Roads Lincoln Mercury in early October; Aratari testified he knew Ciarcia through Thomas Lanci. Lanci was a customer of Cross Roads Lincoln Mercury as was Anthony Liberatore who had purchased two automobiles there.

Salesman Kenneth Ciarcia's employment at Cross Roads Lincoln Mercury was terminated in March of 1978 following his arrest. His employer was collecting Ciarcia's personal effects when he discovered lists of F.B.I. informants and F.B.I. reports concerning Licavoli. The documents were found in a cereal box located in the automobile agency's conference room.

Geraldine Rabinowitz, formerly a clerk with the F.B.I., testified as to her role in obtaining secret F.B.I. documents at the behest of Kenneth Ciarcia. Ciarcia approached her in the spring of 1977 to see if she was interested in securing F.B.I. information about Anthony Liberatore, Thomas Lanci and himself in exchange for help with civil litigation in which Mrs. Rabinowitz was involved. She first provided information about Liberatore. Then, in response to subsequent requests that summer, she secured other information in the F.B.I. file on Licavoli and the F.B.I. list of informants. Liberatore gave her $1,000 in July and provided her with a $15,000 loan in October. In November, Ciaricia asked Mrs. Rabinowitz to obtain information about Ferritto; she informed him she did not have any information to give. After Licavoli's arrest in December, Ciarcia called her at the F.B.I. She did not talk to him. Mrs. Rabinowitz was arrested in March of 1978 and pleaded guilty to two counts of bribery in U.S. District Court.

Electronic eavesdropping of a conversation in Licavoli's residence on October 8, 1977, at a time when F.B.I. agents observing the house determined he and John Calandra were the only ones there, revealed that one of them believed Daniel Greene to be an F.B.I. informant. Another F.B.I. tape of a conversation in the Licavoli residence on September 24, when Licavoli and Calandra were in attendance according to F.B.I. surveillance, revealed a comment to the effect that the Irishman's activities were dif-

ficult to follow but that he would make a mistake at some point.

Following the presentation of the State's case, the trial court granted Calabrese's motion for acquittal and the various remaining defendants presented their respective defenses. None of the defendants took the stand. Each presented alibi witnesses. Two witnesses testified that Cisternino was at Donald C. Ready's apartment at the time of Greene's death. Numerous witnesses were called on Carabbia's behalf, including several alibi witnesses. Two witnesses testified that Carabbia was at an anniversary dinner for his wife's sister and brother-in-law in a Youngstown restaurant on October 5 and into the early morning hours of October 6. Four witnesses testified to having seen Carabbia at a Struthers High School football game in Youngstown on the afternoon of October 6. His son was on the freshman team. Two stated Carabbia was there before the game started; the other two observed Carabbia shortly after the start of the game. They variously recalled that the game started shortly after 4:00, at 4:15 or 4:20 p.m.[4] A private investigator stated he had taken several routes from the Winchester Hills Apartments in Willoughby Hills to Volney-Rodgers Field in Youngstown; the average trip took between an hour and twenty minutes and an hour and twenty-five minutes.

Following presentation of all the evidence, closing argument and the court's charge, the jury found Licavoli, Lonardo and Sinito not guilty of any of the offenses charged and Carabbia and Cisternino guilty of aggravated arson and aggravated murder, as explained above. A motion for a new trial was timely filed and overruled. Pasquale Cisternino and Ronald Carabbia have taken

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4. Two witnesses, a coach and referee, testified during rebuttal that the game started late, at 4:25 or 4:30 p.m.

timely appeals, in Case No. 39894 and Case No. 39916. They have filed a joint brief in which seventeen assignments of error in the lower court proceedings have been asserted, the majority of which relate to both appellants.

ASSIGNMENTS OF ERROR NOS. I AND IV:

I. THE TRIAL COURT'S FAILURE TO ORDER A SUPPRESSION HEARING AND COMPEL THE PRODUCTION OF WITNESSES TO DETERMINE THE ADMISSIBILITY OF EVIDENCE OBTAINED OR DERIVATIVELY OBTAINED THROUGH A FACIALLY DEFECTIVE SEARCH WARRANT AFFIDAVIT CONSTITUTED AN ABUSE OF DISCRETION AND ERROR PREJUDICIAL TO EACH APPELLANT'S FUNDAMENTAL RIGHT TO A FAIR AND IMPARTIAL TRIAL WITH DUE PROCESS OF LAW IN A STATE CRIMINAL PROCEEDING.

IV. THE INTRODUCTION OF EVIDENCE DERIVED FROM SEARCHES AND SEIZURES WHICH WERE VIOLATIVE OF THE APPELLANTS' FOURTH AND FOURTEENTH AMENDMENT RIGHTS, REQUIRES REVERSAL OF THE DEFENDANTS' CONVICTIONS.

A. The Introduction of Evidence Improperly Seized During a Search of Apartment #333, Winchester Hills Apartments, Willoughby Hills, Ohio, on December 5, 1977 and December 13, 1977, Requires Reversal Where There Was No Probable Cause for the Issuance of Said Warrants and the Affidavits in Support of Said Warrants Contained Known False Statements or Recklessly Asserted Material Statements Which Were False.

B(1). The Introduction of Evidence Improperly Seized During a Search of 919 Rondel, Cleveland, Ohio, on February 6, 1978 Requires Reversal Where There Was No Probable Cause for the Issuance of Said Warrant and the Affidavits in Support of Said Warrant Contained Known False Statements or Recklessly Asserted Material Statements Which Were False.

B(2). The Information Asserted in the February 6, 1978 Affidavit in Support of the Warrant Was Too Remote in Time to Establish Probable Cause for Search at 919 Rondel, Cleveland, Ohio.

B(3). The Prejudicial Effect of the Items Seized at 919 Rondel Outweighed the Claim of Relevancy.

C. The Trial Court Improperly Denied Standing of the Defendants to Challenge the Validity of the Searches at #333 Winchester Hills Apartments and 919 Rondel.

Assignments of Error Nos. I and IV will be considered together as they both claim the magistrate did not have probable cause to issue three search warrants, authorizing the December 5 and 13, 1977 searches of apartment no. 333 at the Winchester Hills Apartments in Willoughby Hills and the February 6, 1978 search of the upstairs apartment at 919 Rondel in Cleveland. Incriminating evidence was seized at both locations and admitted into evidence at trial, as discussed above. Appellants claim the seized evidence should have been suppressed.

Before reaching the merits of this argument, it is necessary to determine whether either appellant has stand-

ing to contest any of the searches. The proponent of a motion to suppress evidence as the product of an illegal search and seizure has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure. *Rakas v. Illinois* (1978), 439 U.S. 128. A defendant has no standing to contest a search and seizure where the defendant (a) was not on the premises at the time of the contested search and seizure, (b) had no proprietary or possessory interest in the premises, and (c) was not charged with an offense which includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure. *Brown v. United States* (1973), 411 U.S. 223, 229. *See State v. Adams* (1978), 53 Ohio St. 2d 223.

A full hearing was had on the motion to suppress the evidence seized in the above searches. Neither appellant was at either location at the time of the searches in question. Neither was charged with a possessory offense, and no showing was made by either appellant at the hearing that he had a proprietary or possessory interest in either of the premises. It is uncontested that the lessee of the Winchester Hills apartment was Zoltan Kalman and the lessee of the Rondel apartment was Donald C. Ready. Appellants at the hearing failed to allege any interest in the items seized. Although it may be argued that each appellant could not have alleged ownership in any of the items seized without prejudicing himself at trial, it is noted that the Supreme Court of the United States has considered this dilemma and held that when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt

unless he makes no objection. *Simmons v. United States* (1968), 390 U.S. 377, 394.[5]

The fact that neither appellant meets the standing requirements outlined in *Brown v. United States, supra,* coupled with the principle that suppression of the product of a Fourth Amendment violation may not be urged by one aggrieved solely by the introduction of damaging evidence, *Alderman v. United States* (1969), 394 U.S. 165, 172, leads us to conclude that neither appellant has standing to challenge the seizure of items found on the premises at 919 Rondel or apartment 333 of the Winchester Hills Apartments.

Given the above determination, it is not necessary to address any of the alleged defects in the search warrants. However, since one of the claimed defects raises constitutional issues, we will comment briefly. The thrust of both of these assignments of error is that the magistrate should not have authorized the searches as the affidavits in support of the search warrants included a false statement by informant Raymond Ferritto. All three search warrants were supported by an affidavit of E. Michael Kahoe, a special agent of the Federal Bureau of Investigation, who incorporated in his affidavit a statement given to other F.B.I. agents by Ferritto shortly after his arrest. Ferritto's statement was essentially the same as his testimony at trial with one important difference: in his statement, Ferritto asserted that Cisternino rather than Carabbia had detonated the explosive device that killed Greene, that

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5. Appellant Cisternino asserts he had standing to challenge the validity of the 919 Rondel search as he had been living at that apartment. There was no testimony to that effect at the motion hearing. During presentation of Cisternino's defense, Donald C. Ready, the lessee of that apartment, testified that Cisternino had been staying at his apartment for approximately a year, including the month of October, 1977.

Cisternino was the "man in the back seat".[6] Appellants contend that inclusion of Ferritto's false statement in Kahoe's affidavit destroyed the probable cause for the issuance of the search warrants.

Appellants assert that at most Kahoe knew Ferritto's statement was false and at least the reliability of informant Ferritto was not demonstrated on the face of the affidavit. There was no showing that any F.B.I. agent knew portions of Ferritto's statement were false. During the hearing on the motion to suppress, Kahoe admitted that Ferritto's reliability was not referred to in his affidavit but that certain of Ferritto's revelations were corroborated by independent investigation. To meet the constitutional demand the magistrate must determine probable cause upon sufficient facts. In analyzing hearsay information furnished by an informer to the affiant, the magistrate must be informed of some of the underlying circumstances from which the officer or agent concluded the informant was "credible" or his information "reliable". *Spinelli v. United States* (1969), 393 U.S. 410. *See State v. Graddy* (1978), 55 Ohio St. 2d 132. Certain portions of the Ferritto statement were corroborated by independent investigation. Furthermore, Ferrritto's statement implicated him in the scheme to kill Greene. An affidavit in support of a search warrant which contains information from an identified informant implicating himself in criminal activities constitutes a declaration against penal interest, and as such, carries its own

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6. Ferritto changed his account, placing Carabbia at Brainard Place with him, after being confronted with Louis Aratari's confession to the F.B.I. following Aratari's arrest on February 28, 1978. Aratari asserted four men were at Brainard Place to kill Greene: Ferritto and Carabbia, who had a bomb, and he and Vic Guiles with a high-powered rifle. F.B.I. agent Kahoe executed another affidavit in connection with a related search, which included Aratari's account and defense attorneys were forthwith provided with copies of the March 3, 1978 Kahoe affidavit.

indicia of reliability for purposes of establishing probable cause. *United States v. Harris* (1971), 403 U.S. 573, 583; *United States v. Rosenbarger* (6th Cir. 1976), 536 F.2d 715, 719. There were sufficient underlying circumstances from which a law enforcement official and magistrate could determine that Ferritto's information was reliable.

Appellants claim that the United States Supreme Court's holding in *Franks v. Delaware* (1978), 438 U.S. 154, controls the instant case. That case holds that (1) where a defendant made a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in his affidavit for a search warrant, and if the alleged false statement was necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request so that he might challenge the truthfulness of factual statements made in the affidavit, and (2) if at such a hearing the defendant established by a preponderance of the evidence the allegation of perjury or reckless disregard, and, with the affidavit's false material to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause were lacking on the face of the affidavit. *Franks v. Delaware* does not control this case for its holding is limited to the situation where there is an allegedly false statement by the affiant and the false statement was necessary to the finding of probable cause. That it was presumably Carabbia rather than Cisternino who carried out the bombing neither negates nor vitiates the probable cause to search the domiciles in question.

Based upon the foregoing discussion, Assignments of Error Nos. I and IV are overruled.

ASSIGNMENT OF ERROR NO. II:

II. THE TRIAL COURT'S FAILURE TO ORDER THE PRODUCTION OF INFORMANT-DEFENDANT FRATIANNO FOR THE PURPOSE OF DETERMINING HIS TRUE RELATIONSHIP WITH THE PROSECUTION CONSTITUTED AN ABUSE OF DISCRETION AND PREJUDICIALLY DENIED APPELLANTS THEIR FUNDAMENTAL RIGHT TO A FAIR TRIAL WITH DUE PROCESS OF LAW, WHERE APPELLANTS SHOWED THAT FRATIANNO, AN F.B.I. INFORMANT, WAS KNOWINGLY AND INTENTIONALLY INCARCERATED WITH APPELLANT CISTERNINO AFTER RETURN OF THE INDICTMENT AND AN AGREEMENT TO COOPERATE WITH THE PROSECUTION; AND, THAT FRATIANNO POSSESSED EXCULPATORY EVIDENCE MATERIAL TO THE ISSUE OF APPELLANT CARABBIA'S GUILT OR INNOCENCE.

According to the statement given the F.B.I. by Raymond Ferritto after his arrest and his testimony at trial, James Fratianno recruited Ferrito to participate in the Greene killing. Fratianno was indicted along with the appellants and the other defendants, but was not tried since the State indicated he pleaded guilty to a lesser offense. The record reflects that Fratianno gave a statement to the F.B.I. and that the statement was given to defense counsel the day it was received by the State from the F.B.I.; however, that statement is not in the record. Fratianno did not testify at trial.

Appellants have several contentions relating to Fratianno. They allege that their Sixth Amendment right to counsel was violated when Fratianno was incarcerated with the other defendants after agreeing to become an in-

formant and at that time obtained information helpful to the State's case aganst them. Dialogue between counsel and the court during pretrial proceedings indicated that Fratianno was confined on two occasions to Cuyahoga County Jail, first, after his arrest and later for purposes of entering a guilty plea. The record, however, does not support the contention that he was placed in jail for purposes of obtaining inculpatory information.[7]

Under *Massiah v. United States* (1964), 377 U.S. 201, a defendant's incriminating statements, elicited by government agents, after he has been indicted and in the absence of counsel, are not admissible at trial. This has been applied to voluntary statements made to an informant cellmate, *Henry v. United States* (4th Cir. 1979), 24 Crim. L. Rep. (BNA) 2362. Whatever Fratianno's status when he was incarcerated, no prejudice accrued to appellants, as Fratianno never testified at trial.

Alternatively, appellant Carabbia contends that Fratianno possessed exculpatory evidence material to the issue of his guilt or innocence. This is unsupported by the record. The State provided defense attorneys with Fratianno's statement to the F.B.I. The State was under a continuing duty to produce all material discoverable under Crim. R. 16. During discussions before the court on whether Fratianno had given any exculpatory statements,

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7. The record indicates that a joint motion was filed on January 5, 1978 to prohibit interrogation of the defendants in absence of counsel; however, that motion is not in the record. On January 17, 1978, the trial judge ordered the Sheriff to preclude any communication or interrogation of any defendant with or by official personnel of the State or the U.S. unless a defendant acquiesced in writing and counsel was notified. During pretrial motion proceedings, Calabrese's counsel asked the trial judge whether he was aware that Fratianno, after having cooperated and become an informant, was in jail with the defendants. The judge stated that he was aware only that Sinito's counsel told him he had been removed from the county jail and at that time a motion was filed to preclude repetition of that procedure.

the prosecutor stated there was nothing exculpatory other than what had been already provided. There is nothing in the record to indicate a breach of the prosecutor's duty to disclose.

During the pretrial motion proceedings, defense counsel expressed a desire to call Fratianno as a witness and informed the court of their inability to secure his presence. The only motion to suppress relating to Fratianno was that filed on behalf of Carabbia seeking the suppression of tapes of telephone conversations allegedly between Fratianno and Carabbia. The tapes were obtained through court-ordered electronic surveillance in California. The motion was based on the contention that the F.B.I. agents monitoring Fratianno's conversations had failed to follow the federal minimization order. Fratianno's testimony was not necessary for resolution of that issue and counsel made no representation that it was. No witnesses were called; rather the trial judge ruled on the motion based upon arguments of counsel and transcripts of the tapes of the telephone conversations.

There was no prejudice to appellants through any of the proceedings in the trial court in respect to James Fratianno.

Assignment of Error No. II is not well taken.

ASSIGNMENT OF ERROR NO. III:

III. THE STATE'S FALSE REPRESENTATIONS TO THE JURY REGARDING THE "UNENFORCEABILITY" OF THE PLEA BARGAIN AGREEMENTS ENTERED WITH KEY STATE WITNESSES RAYMOND FERRITTO AND LOUIS ARATARI AND INFORMANT-DEFENDANT FRATIANNO CONSTITUTED A PREJUDICIAL DENIAL OF EACH APPELLANT'S FUNDA-

MENTAL RIGHT TO DUE PROCESS OF LAW, WHERE THE TRIAL COURT HAD EXPRESSLY STATED THAT IT HAD NO INTENTION OF INTERFERING WITH THE UNDERSTANDING OF THE PARTIES TO THE PLEA AGREEMENTS.

Appellants assert that the following comments by one of the prosecuting attorneys concerning the plea bargaining agreements were misrepresentations:

> And a part of the bargaining with [Ferritto] was that yes, we would agree it would be five years. But you have to understand what this deal is. We don't guarantee anything. Every deal we made, Fratianno, Ferritto and Aratari, is nothing more than a recommendation. No courts listen to us out of necessity, no court has to listen to us.
>
> Mr. Yelsky: I will object to this.
>
> The Court: Overruled.
>
> Mr. Marino: The Judge that just overruled that statement is the one that makes the decision on our recommendation.
>
> Now, they have tried to give you the impression that we just tell people what to do and they walk back out on the street after five years.
>
> That is not true. Our agreements get turned down. And I can tell you this, if the Court turns down the agreement on anyone, like Ferritto, Fratianno or Aratari, as far as I am concerned we have lived up to our part of the bargain, and they deserve whatever they get. Because they are murderers just like these people. (Tr. 9740-9741.)

* * * * *

> And when they say we make deals, yes. We stink when we make those deals. But we can't do anything else to catch these people but to make these deals. And Walsh and I made those deals to catch these people. And if the Judge doesn't take our recommendation, then that's fine, because there is that many more people in jail for what they have been doing. (Tr. 9764.)

Appellants' contention is that these comments imply the plea bargaining agreements with Ferritto and Aratari were unenforceable, whereas the Court had indicated in accepting Ferritto's plea that it had no intention of interfering with the understanding of the State, Ferritto and his attorney. The transcript of proceedings in which Ferritto's plea was accepted is not in the record.[8] During the pretrial proceedings, in response to a defense motion to divulge consideration given Ferritto, the agreement made by the State with him was read into the record.[9] The Court then declared that it was not bound by the agreement and could do only what was proper under the circumstances, having to wait to see what those circumstances were. Ferritto and Aratari testified at trial as to their agreements with the State. They were both

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8. Attached to appellants' brief as "Exhibit on Appeal 1" is a copy of the January 3, 1978 plea of Ferritto, which however is not a part of the record on appeal. *See State v. Ishmail* (1978), 54 Ohio St. 2d 402. However, a perusal of that attachment reveals that the Court twice stated that the court could not be bound by any agreement entered into between the parties or their counsel.

9. Under the terms of the agreement, Ferritto agreed to plead guilty to aggravated murder and aggravated arson and would be given a suspended sentence. In exchange for information and truthful testimony, the State would recommend withdrawal of his guilty pleas, reduction of the aggravated murder charge to voluntary manslaughter and five year concurrent sentences. If Ferritto did not comply, the Court accepting his pleas would then consider sentencing Ferritto for aggravated murder and aggravated arson.

thoroughly cross-examined on that subject. The record reveals no misrepresentation by the State as to the character of either those agreements or the Court's role.

Assignment of Error No. III is without merit.

ASSIGNMENT OF ERROR NO. V:

V. THE RIGHT OF AN ACCUSED TO RELEVANT EVIDENCE, WHETHER THE SAME BEARS MORE DIRECTLY ON THE ISSUE OF GUILT OR INNOCENCE, OR ON THE CREDIBILITY OF THE VARIOUS WITNESSES, CANNOT BE ARBITRARILY DENIED ON THE BASIS OF ASSERTED PRIVILEGES, RULES OR REGULATIONS.

A. Statements (F.B.I. 302's included) Adopted or Approved by a Witness or Which Are Substantially Verbatim Recitals of Witness' Oral Statements Are Discoverable and Must Be Made Available to the Defense.

B. A Defendant's Right to a Fair Trial and to Confront the Witnesses Who Testify Against Him Cannot Be Subordinated to Restrictions Placed on the Witness by Government Regulations.

We turn first to subsection "A", relating to court-imposed limitations on discovery of witnesses' statements. We note that there is nothing in the record indicating that appellants were foreclosed from discovering any written statements given to federal or state law enforcement authorities. However, on a number of occasions, the Court prevented defense attorneys from having access to F.B.I. agents' investigative reports, commonly referred to as "302" reports. The defense sought these reports in a

number of different contexts: twice after witnesses who said they had talked to the F.B.I. testified on direct examination; when F.B.I. agents in testimony acknowledged that they had executed "302" forms in connection with their investigations; and as a blanket request for all "302" forms in possession of the F.B.I.

The Court allowed defense access only to "302" forms relating to Fratianno and Ferritto, noting the defense's need to have access to reports showing Ferritto's differing accounts of the bombing.

Disclosure of evidence by the prosecuting attorney in a state criminal proceeding is controlled by Crim. R. 16(B).[10] Crim. R. 16(B)(2) describes what information is not subject to disclosure and provides:

> Information not subject to disclosure. Except as provided in subsections (B)(1)(a), (b), (d), (f), and (g), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal documents made by the prosecuting attorney or his agents in connection with the investigation or prosecution of the case, or of statements made by witnesses or prospective witnesses to state agents.

Crim. R. 16(B)(1)(g) reads in pertinent part:

> In camera inspection of witness' statement. Upon completion of a witness' direct examination at trial, the court on motion of the defendant shall conduct an in camera inspection of the witness' written or recorded statement with the defense attorney and prosecuting attorney present and participating, to de-

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10. The Jencks Act (18 U.S.C. § 3500) governs the production of statements to government agents by government witnesses in federal trials. *See Goldberg v. United States* (1976), 425 U.S. 94; *Palermo v. United States* (1959), 360 U.S. 343; *Jencks v. United States* (1957), 353 U.S. 657.

termine the existence of inconsistencies, if any, between the testimony of such witness and the prior statement.

This Court has held that Crim. R. 16(B)(1)(g) is not applicable to reports made by a prosecuting attorney or his agents in connection with the investigation or prosecution of a case. *State v. Smith* (1976), 50 Ohio App. 2d 183, 202. *See also State v. Washington* (1978), 56 Ohio App. 2d 129, wherein the Court of Appeals for Montgomery County stated at 133-134:

> As will be noted, the only statement subject to such a procedure [that outlined under Crim. R. 16 (B)(1)(g)] is one which is written or recorded. The word "written" in this context does not refer to notes made by a detective talking to a witness during an investigation. The word "written" refers to a writing made by a witness or by someone else at that witness' direction. The word "recorded" also cannot refer to such notes as it refers only to a mechanical reproduction of a statement by tapes or the like; otherwise, it would be a writing, and a distinction between "written" and "recorded" would not be necessary if the word "recorded" was merely another way of referring to a writing.
>
> This construction that such notes made as a result of an oral interview are not referred to by this subsection of the rule is strengthened by comparing this subsection with subsection (B)(1)(a)(i) and (ii) of this same rule [controlling disclosure of a statement of a defendant or codefendant] wherein a distinction is made between "relevant written or recorded statements" and "written summaries of any oral statement." The failure to include a reference to summaries of oral statements in the subsection under consideration

when such reference was included in the prior subsection in the same rule indicates an intent to exclude oral statements and notes taken of them from the operation of subsection (g). Furthermore, it is even doubtful if the private notes of the detective could be classified as a written summary of an oral statement if such a category had been included in subsection (g).

It is clear to us that such memoranda were not included within the purview of this subsection because it would be incorrect to permit a perusal of notes made by a detective which do not have the imprimatur of the witness. The notes may or may not be accurate and a witness should not be bound by or cross-examined concerning them unless they have received his approval.

*State v. White* (1968), 15 Ohio St. 2d 146, relied upon by appellants and decided before the enactment of the Ohio Rules of Criminal Procedure, is not controlling.

We find that Crim. R. 16(B)(2), as interpreted by *State v. Smith* and *State v. Washington, supra,* controls this case and the contents of the F.B.I. "302" forms were not discoverable by appellants at any stage of the proceedings. The fact that internal reports of federal authorities rather than state law enforcement officials are at issue does not alter the result.

We turn now to appellants' contention in subsection "B" that they were deprived of their right to confront prosecution witnesses by restrictions placed upon them by government regulations.

Numerous F.B.I. agents testified during presentation of the State's case relative to articles recovered during searches and surveillance of some of the defendants' ac-

tivities. During cross-examination of three F.B.I. agents by Carabbia or Cisternino's counsel, when counsel sought to delve into other areas than that covered during direct examination, the three agents declined to respond on the grounds that the questions sought testimony on subjects beyond the scope of their authorization.

At issue is the applicability of the Code of Federal Regulations, 28 C.F.R. §§ 16.22-16.24. Sections 16.22-16.24 provide in pertinent part:

> § 16.22 *Production or disclosure prohibited unless approved by appropriate Department official.*
>
> No employee or former employee of the Department of Justice shall, in response to a demand of a court or other authority, produce any material contained in the files of the Department or disclose any information relating to material contained in the files of the Department, or disclose any information or produce any material acquired as part of the performance of his official duties or because of his official status without prior approval of the appropriate Department official or the Attorney General in accordance with § 16.24.
>
> § 16.23 *Procedure in the event of a demand for production or disclosure.*
>
> (a) Whenever a demand is made upon an employee or former employee of the Department for the production of material or the disclosure of information described in § 16.21(a), he shall immediately notify the U.S. attorney for the district where the issuing authority is located. The U.S. attorney shall immediately request instructions from the appropriate Department official, as designated in paragraph (b) of this section.

(b) The Department officials authorized to approve production or disclosure under this subpart are:

(1) In the event that the case or other matter which gave rise to the demanded material or information is or, if closed, was within the cognizance of a division of the Department, the Assistant Attorney General in charge of that division. This authority may be redelegated to Deputy Assistant Attorneys General.

(2) In instances of demands that are not covered by paragraph (b) (1) of this section:

(i) The Director of the Federal Bureau of Investigation, if the demand is one made on an employee or former employee of that Bureau for information or if the demand calls for the production of material from the files of that Bureau.

* * * * *

(c) If oral testimony is sought by the demand, an affidavit, or, if that is not feasible, a statement by the party seeking the testimony or his attorney, setting forth a summary of the testimony desired, must be furnished for submission by the U.S. attorney to the appropriate Department official.

§ 16.24 *Final action by the appropriate Department official or the Attorney General.*

(a) If the appropriate Department official, as designated in § 16.23(b), approves a demand for the production of material or disclosure of information, he shall so notify the U.S. attorney and such other persons as circumstances may warrant.

(b) If the appropriate Department official, as designated in § 16.23(b), decides not to approve a

> demand for the production of material or disclosure of information, he shall immediately refer the demand to the Deputy Attorney General for decision. Upon such referral, the Deputy Attorney General shall make the final decision and give notice thereof to the U.S. attorney and such other persons as circumstances may warrant.

28 C.F.R. §§ 16.25 and 16.26 describe the applicable procedure when a department decision concerning a demand is not made prior to the time a response to the demand is required and the procedure in the event of an adverse ruling.

Appellants and the other defendants never sought material or information through affidavit or statement summarizing the testimony desired, as outlined under § 16.23 (c). The F.B.I. agents refused to disclose the information acquired as a part of their official duties as prior official approval of a request had not been obtained.

The following is a synopsis of what transpired at trial during the testimony of the three witnesses. F.B.I. agent Robert J. Lenehan testified on direct examination as to having found a portion of a license plate in the vicinity of West 23rd Street and Peninsula in Erie, Pennsylvania. (Frank Thomas, Raymond Ferritto's nephew, had already testified that Frank Dovishaw, a friend of Ferritto, had removed the plate from Ferritto's "getaway" car, broken it into pieces, and thrown it out of the window in that vicinity.) Lenehan also described items seized during an October 28, 1977 search of Ferritto's house. During cross-examination by Carabbia's counsel, Lenehan was questioned as to how many times he had seen Dovishaw and the conversations had. Kenneth Bravo, an attorney for the U.S. Department of Justice, told the court at this point that the witness had been given authority to testify only

as to his participation in searches in accordance with the C.F.R. procedure. The court consequently foreclosed questioning about contacts had with Dovishaw. After Lenehan revealed that Frank Dovishaw had been present during three searches instructing the F.B.I. where to look. Carabbia's attorney several times sought to elicit when Dovishaw first cooperated with the F.B.I. and whether or not Dovishaw had been an F.B.I. agent for several years. The witness refused to answer.

F.B.I. agent Robert S. Friedrick testified on direct examination as to his participation in the search of Carmen Marconi's residence and an Erie, Pennsylvania search. During cross-examination by Carabbia's counsel, the witness acknowledged having taken a statement from Dovishaw around November 22, 1977; when questioned whether before that time Dovishaw had provided the F.B.I. with information, Friedrick responded he could not answer as the question went beyond the scope of his authorization. The trial judge at this point ruled, relating the ruling to Friedrick, Lenehan and any other agent to be examined with respect to subject matter beyond the scope of their authorization, that he would uphold the agents' entitlement to refrain from answering based upon the federal regulation. Cisternino's counsel interjected that there should be a hearing on the authorization. The court explained that his ruling was based on the federal regulation, relevance and excessive scope of cross-examination.

F.B.I. agent James Summerford testified as to his participation in a December 5, 1977 search of James Licavoli's residence. During cross-examination, the witness stated he could not testify whether or not the Licavoli house was under twenty-four hour surveillance as that was outside the scope of his authority. (Evidence as to the extent of the surveillance came in during the testimony of F.B.I.

agent Gary Bruce Ingram who participated in the surveillance.)

Licavoli's counsel filed subpoenas duces tecum directed to various F.B.I. agents. The court granted a motion to quash the subpoenas, stating the agents could be subpoenaed as individuals. At this point, Bravo of the U.S. Department of Justice reminded the defense attorneys that by federal regulation counsel seeking testimony must in writing designate the areas of interrogation. Bravo outlined the procedure to follow in order to obtain approval; absent the approved request, he informed counsel, an agent would be required to decline to answer. Licavoli's counsel stated he should not be put in a position of having to screen evidence with the State and that his client had been prevented access to evidence. The court ruled that the F.B.I. agents would not be required to testify under the conditions desired by the defense.

The record shows no effort by appellants to submit the affidavit or statement summarizing the testimony desired from each witness so that the federal authorities could consider the request and determine whether or not to grant permission for the testimony. Further, it is apparent that appellants were well aware of the requirements; yet on three occasions they sought to enter into areas that were beyond those authorized pursuant to statements filed by the State relating to searches in which the F.B.I. agents participated. In view of this, appellants are in no position to claim error in the agents' refusal to answer questions outside the scope of the authorization.

The situation here is analogous to that presented in *United States v. Allen* (10th Cir. 1977), 554 F.2d 398, wherein the United States Court of Appeals, Tenth Circuit, determined that a defendant could not claim error in the court's refusal to require testimony by a prosecutor

at a hearing on the issue of preindictment delay where counsel had not submitted a statement indicating the testimony desired so that the Department of Justice could consider the request and determine whether or not to grant permission for testimony. The Court found 28 C.F.R. § 16.22 valid, citing *United States, ex rel. Touhy v. Ragen* (1951), 340 U.S. 462, 467-469, and *Boske v. Comingore* (1900), 177 U.S. 459, 469-470.

As did the defendant in *United States v. Allen, supra,* appellants argue that, following the decision in *United States v. Nixon* (1974), 418 U.S. 683, such an individual may be supoenaed and required to produce relevant evidence. As stated by the Court in *United States v. Allen* at 554 F.2d 406:

> We do not have the problem, however, of whether the court should have rejected a refusal by the Department due to the constitutional guarantees of the Fifth and Sixth Amendments. Since the defendant did not follow the procedure and submit the required summary of testimony desired, the Department made no decision whether the prosecutor could testify and we do not reach the constitutional claim.

For the reasons discussed above, Assignment of Error No. V is overruled.

ASSIGNMENT OF ERROR NO. VI:

VI. THE STATE ERRED, AND THE ACCUSED RONALD CARABBIA WAS DENIED DUE PROCESS, AS A CONSEQUENCE OF (1) THE TRIAL COURT'S FAILURE TO EXCLUDE EVIDENCE SHOWING IDENTIFICATIONS THAT WERE MADE OF RONALD CARABBIA BY THE SPOTHS, AND (2) THE TRIAL COURT'S FAILURE TO SUPPRESS AND EX-

CLUDE EVIDENCE SHOWING DEBBIE SPOTH'S IN-COURT IDENTIFICATION OF RONALD CARABBIA.

A. Where Various Eyewitnesses Were Unable to Identify the Defendants From Photographs Which Had Previously Been Shown to Them From Still Others of a Particular Defendant That Had Been Seen by Them in the Newspapers and on Television, the Presence of Defense Counsel Was Required at the Photographic Display of the Indicted Defendants When They Were Shown to Those Same Eyewitnesses During the Course of a Highly Publicized Capital Murder Trial.

B. Due Process Is Violated When the Prosecutor, in Quest of Identification Evidence While the Trial is Actually in Progress, Presents Photographs to Eyewitnesses Which Depict Only the Defendants and Provide No Realistic Alternative to Identification of a Particular Defendant; Or, Where the Facts and Circumstances Otherwise Show That the Witnesses Were Manipulated Into Identifying the Particular Defendant Whose Identification Was Being Sought.

C. Given a Determination Either (1) That, Under the Facts of This Case, Ronald Carabbia Was Entitled to the Presence of Counsel When the Photographs Were Displayed to the Eyewitnesses, or (2) That the Identification Testimony Relative to Him Was So Tainted By, or Was the Product Of, Suggestive Procedures Used by the Prosecutor;

Its Admission as Evidence Against Such Defendants Violated Due Process.

D. Reliability Being the "Linchpin in Determining the Admission of Identification Testimony," a Circumstance Which "Depends on the Totality of the Circumstances Surrounding It," the Fact That One of the Eyewitnesses Actually Picked Another and Different Person (in this case as the person in whose place Ronald Carabbia was convicted) Was a Relevant Fact and "Circumstance" That Was Proper for Consideration By the Jury.

E. Neither the Summation of Counsel, Nor His Cross-Examination of the Identification Witnesses, Nor Even the Court's Instruction on the Credibility of the Various Witnesses (including those that made identification) May Be Regarded as a Substitute for a Proper Instruction on Mistaken Identity.

This assignment of error attacks the procedure whereby Debbie and Gregory Spoth identified a photograph of Ronald Carabbia as "the man in the back seat" in the blue Plymouth seen near Brainard Place at the time of the explosion which killed Daniel Greene.

A brief review of the testimony of both Spoths at the mid-trial hearing on Carabbia's motion to suppress is necessary. While waiting for the blue Plymouth facing her vehicle to make a turn onto Brainard Road so that she could proceed to turn, Debbie Spoth observed the man in the back seat. He was sitting at an angle looking around, his arm on the front seat. She reported his description to her father, who relayed it to the Lyndhurst

police: a man who was older and heavier than the approximately 45-year-old man in the front seat with a dark complexion and receding dark hair. After she and thereafter the driver of the other vehicle had turned onto Brainard Road, the explosion in the parking lot at Brainard Place occurred. As the blue Plymouth passed, she observed both individuals again as they were looking in her direction and at the scene of the explosion.

That evening, the Spoths contacted her father, Arthur Volpe, a Berea policeman. They gave descriptions of the suspicious vehicle and its occupants. Over the next few months, the Spoths individually were shown five photograph arrays, four of which were shown them by Mr. Volpe, as supplied by the Lyndhurst Police Department.

On October 9, 1977, Mrs. Spoth identified two photographs of Raymond Ferritto as the driver of the vehicle. On October 22, Mrs. Spoth was shown several dozen photographs which included a photograph of Ferritto and one of Carabbia. She again identified Ferritto as the driver but did not recognize the man in the back seat. The photograph of Carabbia depicted a heavy-set man with a double chin; he had dark hair, long on the sides and receding on top. No identification was made from a third set of photographs shown Mrs. Spoth on November 2. A fourth array of six candid photographs shown Mrs. Spoth on December 4 included a photograph of Carabbia. It was a blurred full-length photograph taken from a side angle, depicting a slim younger man. Mrs. Spoth made no identification at that time.

On February 16, 1978, the Spoths met with various police officers and prosecutor Carmen Marino at her parents' house. According to Mrs. Spoth, Marino showed her nine color photographs, laying them out on the dining

room table, and asked if she recognized any. All the photographs were recent front and side view police photographs except for that of Ferritto. Mrs. Spoth recognized the one of Ferritto as the driver of the Plymouth. She recognized one of Licavoli since she had seen his picture in a newspaper and Cisternino from having seen his picture on television. She recognized the photograph of Carabbia as the man she observed in the back seat of the blue Plymouth. All except one of the photographs depicted men with receding hairlines; five had dark hair; five had full faces. All were of apparently Italian ancestry. The age range was from mid-thirties to mid-seventies.

At the motion hearing, Mrs. Spoth identified Carabbia, who was sitting with five other defendants and their attorneys, as the man in the back seat. She stated she had retained an image in her mind and Carabbia looked just like the image. She stated that although she had selected a photograph as the man in the back seat, she was not able to make an absolutely positive identification until the court session.

Gregory Spoth separately had been shown the same photograph arrays as his wife and selected Ferritto's photographs as that of the driver. He did not identify Carabbia's photograph until the array which prosecutor Marino showed him. He recalled that he commented at the time the photograph of Carabbia "looked much similar to the likeness that I thought the back seat gentleman had". When asked at the hearing whether he could identify the man in the back seat from those in the courtroom, Spoth testified "there is one individual that seems to resemble the person I saw very strongly", pointing to Ralph Sperli, Cisternino's attorney.

Carabbia's attorney indicated to the court that he thought Carmen Marino should take the stand at the hear-

ing. In response to the judge's query whether or not he felt there was anything that was not elicited, counsel stated it should be made clear that Marino asked the Spoths individually if they recognized any of the photographs. The judge stated there had been voluminous testimony as to the procedure used and no necessity existed for any further testimony. The court then overruled the motion to suppress Mrs. Spoth's identification and reserved ruling as to Mr. Spoth.

Before the jury, Mrs. Spoth identified Carabbia as the man in the back seat and gave testimony on her out-of-court identification. She noted her confusion at earlier having seen news accounts identifying Cisternino as the passenger in the car leaving the scene as she knew he was not the man. Gregory Spoth indicated that he could select from those in the courtroom persons who resembled the man in the back seat. He was unsure if he could point out the man who was actually there. The court ruled that the witness would be foreclosed from selecting more than one individual resembling the man in the back seat. As Mr. Spoth remained unable to identify anyone in particular, the trial judge then ruled that he could not make any identification or be cross-examined on the fact that at the motion hearing he identified Ralph Sperli as most resembling the man in question.

Appellants claim error as to various aspects of the out-of-court and in-court identification procedure. First, they claim that presence of counsel was required at the February 16, 1978 photograph array. The Sixth Amendment does not grant the right to counsel at photograph displays. *United States v. Ash* (1973), 413 U.S. 300, 321. *See State v. Perryman* (1976), 49 Ohio St. 2d 14, 21-22.

Secondly, appellants challenge Debbie Spoth's out-of-court identification as so impermissibly suggestive as to

give rise to a very substantial likelihood of irreparable misidentification. In determining the correctness of this contention, a two-step approach is used. *See Neil v. Biggars* (1972), 409 U.S. 188. The first inquiry is whether or not an impermissibly suggestive procedure was used in obtaining the out-of-court identification. If so, the second inquiry is whether, under all the circumstances, that suggestive procedure gave rise to a substantial likelihood of irreparable misidentification. The second inquiry into the "totality of the circumstances" requires consideration of the following factors: the opportunity to view the individual at the time of the crime; the witness' degree of attention; the accuracy of the witness' prior description of the alleged criminal; the level of certainty demonstrated by the confrontation; and the length of time between the crime and the confrontation. *Neil v. Biggars, supra* at 199; *Manson v. Brathwaite* (1972), 432 U.S. 98, 114.

We find that this issue is resolved without having to proceed beyond the first inquiry. The procedure used was not unnecessarily suggestive.

The fact that assistant prosecutor Carmen Marino, rather than a police officer, conducted the photograph display is neither extraordinary nor suggestive. *See United States v. Ash* (1973), 413 U.S. 300, 320. The record does not reveal that he encouraged Mrs. Spoth to select the photograph of Carabbia over any of the others; rather, he placed the photographs on a table in front of Mrs. Spoth and asked if she recognized anyone. According to both Spoths, each looked at the photographs without the other in the room.

Among the police photographs were those of five individuals whose physical appearance approximated the description of the man in the back seat given by Mrs. Spoth to the authorities following the explosion. Appellant

Carabbia maintains that his picture was distinguishable because a photograph of him had been in two other displays shown Debbie Spoth. This was true of most others whose photographs were in the February 16 array; in all cases there was great variation in hair color, weight and age. One of the earlier photographs showed Carabbia with a different long hair style and at a much heavier weight; the other, which was unclear, showed a young, slim man. The description Mrs. Spoth gave and the photograph she ultimately identified were far different from the earlier photographs. The fact that Mrs. Spoth had not earlier identified Carabbia is a question of credibility, thoroughly delved into by all defense attorneys during cross-examination.

As Carabbia's photograph bore no distinguishing characteristics, and several others in the array had a number of similarities in physical appearance, the out-of-court identification procedure was not unnecessarily suggestive. Consequently, we find it unnecessary to determine whether under the totality of the circumstances test the out-of-court and in-court identification given by Mrs. Spoth would be otherwise admissible.

Mr. Spoth was not permitted by the court to testify that he had selected Carabbia's photograph from the array as he was unable to make an in-court identification. However, as their third contention under this assignment of error, appellants assert that they should have been able to elicit on cross-examination that previously, during the motion to suppress hearing, Mr. Spoth had identified Cisternino's attorney as strongly resembling the man in the back seat. Although normally a permissible impeachment technique, to elicit such an acknowledgement by Spoth could have operated to Carabbia's or other defendants' prejudice by allowing the jury to theorize who, if anybody, most re-

sembled Ralph Sperli. The court forestalled prejudice to any defendant by its ruling.

Fourthly, Carabbia asserts that the court should have given the jury an instruction on identification testimony such as that adopted in *United States v. Telfaire* (D.C. Cir. 1972), 469 F.2d 552. The model instruction adopted by the District of Columbia Circuit in *Telfaire* informs the jury that it should consider (1) the capacity and opportunity of the witness reliably to observe the offender; (2) the question whether the identification was the product of a witness' own recollection, in view of the strength of the identification and the circumstances under which it was made; (3) the inconsistent identifications made by the same witness; and (4) the credibility of the witness. The court refused to give a *Telfaire* instruction, giving instead the standard instruction on credibility of witnesses.

The instruction has been favorably received in a number of federal circuits.[11] But these cases have emphasized that the eyewitness identification instruction need only be given when the issue of identity is crucial, such as where no corroboration of the testimony exists. *See United States v. Scott* (6th Cir. 1978), 578 F.2d 1186, 1191. There is no requirement under Ohio case law for an eyewitness identification instruction. It is unnecessary to impose such a requirement on a trial court under the facts of this case where in addition to Mrs. Spoth's identification, two participants in the bombing, Raymond Ferritto and Louis Aratari, both testified that Carabbia was at the scene and other evidence linked Carabbia to the conspiracy.

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11. *See United States v. Barber* (3rd Cir. 1971), 442 F.2d 517, 528; *United States v. Holley* (4th Cir. 1974), 502 F.2d 273, 275; *United States v. O'Neal* (6th Cir. 1974), 496 F.2d 368, 373; *United States v. Hodges* (7th Cir. 1975), 515 F.2d 650, 652-653; and *United States v. Roundtree* (8th Cir. 1975), 527 F.2d 16, 19. *See however United States v. Masterson* (9th Cir. 1976), 529 F.2d 30, 32, and *United States v. Scott* (6th Cir. 1978), 578 F.2d 1186, 1191.

Based on the foregoing, we find Assignment of Error No. VI not well taken.

ASSIGNMENT OF ERROR NO. VII:

VII. THE DEFENDANT'S RIGHT TO CROSS-EXAMINE WITNESSES IN ALL RELEVANT AREAS, SECURED BY THE CONFRONTATION CLAUSE OF THE UNITED STATES CONSTITUTION, WAS VIOLATED AS A CONSEQUENCE OF THE COURT'S CURTAILMENT OF QUESTIONS BY DEFENSE COUNSEL DESIGNED TO DISCREDIT CERTAIN PROSECUTION EVIDENCE.

Appellants assert that their attorneys were prevented from fully cross-examining those witnesses testifying with respect to the Spoth identification process. Instances cited for the most part reflect that there was no limitation or proper limitation of repetitive or rhetorical questions. Many of the instances cited refer to cross-examination conducted by counsel for other defendants.

During cross-examination of Debbie Spoth by Cisternino's counsel, the court sustained an objection to the question whether or not a suggestion was made to her as to who was the man in the back seat. Cisternino contends that the question was critical as the court would not allow assistant prosecutor Carmen Marino to take the stand. This limitation was harmless error, as during the cross-examination by Carabbia's counsel, it was elicited that Marino only asked her during the photograph display if she recognized anyone.

The only time any defense attorney exhibited an interest in calling Carmen Marino to the stand was during the hearing on the motion to suppress the Spoths' identification testimony. After the voir dire of Mr. and Mrs. Spoth,

as described under the previous assignment of error, Carabbia's attorney indicated to the court his desire to examine Marino since he wanted it on the record that Marino asked both Spoths individually if they could recognize anyone. The trial judge felt there had been a great deal of testimony on this point. The record does not support the implication that Marino made any suggestion that Carabbia was the man in the back seat; rather, it is clear from the testimony that no suggestion was made to Mrs. Spoth by anyone.

Assignment of Error No. VII is not well taken.

ASSIGNMENT OF ERROR NO. VIII:

VIII. THE TRIAL COURT'S FAILURE TO PROHIBIT THE STATE FROM CALLING A WITNESS, AL WEINER, IT KNEW WOULD ASSERT HIS FIFTH AMENDMENT PRIVILEGE TO THE PREJUDICE OF APPELLANTS CONSTITUTED AN ABUSE OF DISCRETION AND DEPRIVED EACH APPELLANT OF HIS FUNDAMENTAL RIGHT TO A FAIR TRIAL WITH DUE PROCESS OF LAW, WHERE INFERENCES ELICITED FROM THE WITNESS' REFUSAL TO ANSWER ADDED CRITICAL WEIGHT TO THE PROSECUTION'S CASE IN A FORM NOT SUBJECT TO CROSS-EXAMINATION.

Prior to the State's calling Albert Weiner to testify, it was established that the 1970 red Chevrolet Nova used as the "bomb car" had been owned by Dealer's Outlet and had never been sold. Albert Weiner, an acquaintance of Thomas Sinito, was the owner of Dealer's Outlet. The certificate of title indicated the Nova had been transferred to a "Harry Rollins". The notary signature of Roger

Wood on the certificate of title and other documents had been forged. A power of attorney signed by "Rollins", also containing the forged Wood notarization, gave Weiner authority to apply for a title.

At a hearing in chambers attended by trial counsel and Weiner's attorney, the State announced its intention to call Albert Weiner as a witness. His attorney said he would assert his Fifth Amendment privilege not to testify. Weiner had refused to talk to law enforcement authorities or the prosecution. The court noted that if the State were not allowed to call Weiner, the jury would be left with the impression the State had made no effort to secure his presence. Over objection of counsel, the court allowed the State to call Weiner.[12] The understanding was that the State would call Weiner, elicit his name and address, and no further testimony would be elicited; and jury would be excused and all attorneys would meet in chambers.[13]

The following questions and responses were given during Weiner's testimony:

By Mr. Marino:

Q. State your full name for the Court, please.

A. Albert Weiner.

Q. Spell your name for the Court.

A. W-e-i-n-e-r.

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12. Various reasons were advanced in the discussions why Weiner would assert his Fifth Amendment privilege against self-incrimination. The State supplied Westlake Police Department reports indicating Weiner had reported threats on his and his family's lives. At least two theories as to who was threatening him were advanced. His attorney stated that federal authorities had indicated criminal charges might be filed against Weiner.

13. This understanding, offered by the court off the record, was placed in the record by the court after Weiner had taken the stand.

Q. Mr. Weiner, have you ever been associated with Dealers Outlet?

A. Your Honor, in view of the fact that I have been threatened through my attorney—

The Court: Just a moment, just a moment. Can you answer the question?

The Witness: Yes, I can, your Honor.

[Weiner's Attorney:] Your Honor—

The Court: Would you do so.

The Witness: I would like, your Honor, to invoke my rights under the Fifth Amendment, against self-incrimination.

The Court: This court will stand in recess. (Tr. 2168-2169.)

In chambers immediately following the above unsolicited responses from Weiner, curative instructions were requested. Cisternino's counsel requested a voir dire of Weiner to establish that none of the defendants had made threats and he asked for a cautionary instruction. Carabbia's counsel requested an instruction that Weiner was not asserting his Fifth Amendment privilege out of fear and then requested the court to instruct the jury to strike Weiner's statement and give a curative instruction. The court announced it would give a curative instruction, but not any of the ones that the various defense counsel suggested. The trial judge stated to the jury:

> . . . You are instructed to disregard any utterance made by Mr. Weiner. Strike any such utterance from your minds. It is stricken from the record. (Tr. 2856.)

From the record it is clear that there was no more than a possibility that Albert Weiner would assert his

privilege against self-incrimination, especially in light of the fact that the court instructed the prosecution to elicit only the basic information of name and address. The issue then is whether it was error for the court to allow the State even to call Weiner to testify.

The major case in this area is *Namet v. United States* (1963), 373 U.S. 179. Under the *Namet* rule, the practice of compelling a witness to invoke his Fifth Amendment privilege can require reversal in two circumstances: (1) when it amounts to prosecutorial misconduct, *i.e.*, when a prosecutor knowingly attempts to influence the jury through impermissible inferences, and thus deprives the defendant of his right to due process; or (2) when it allows the prosecution to add weight to its case by eliciting evidence in a manner which does not allow the defendant to subject the witness to cross-examination, and thus deprives him of his right to confrontation guaranteed by the Sixth Amendment. *See Moynahan v. Manson* (D.C. Conn. 1976), 419 F. Supp. 1139, 1148-1149, affirmed without published decision (2nd Cir. 1977), 559 F.2d 1204, *cert. denied* (1977), 434 U.S. 939.

Appellants were not deprived of their right to confrontation as the prosecution did not "elicit evidence" by propounding any questions to which an assertion of a Fifth Amendment privilege would add weight to its case. Only two preliminary questions were propounded.

There is a split of authority on whether or not calling a witness to testify when a prosecutor has knowledge that he will invoke the Fifth Amendment is misconduct. Many jurisdictions consider this misconduct especially when the witness is involved in the same crime. *See* Annot., 86 A.L.R.2d 1443 (1962). The Supreme Court of Ohio has recognized the right to call a witness and ask questions even though he has previously indicated he will refuse to tes-

tify on the grounds that to do so would incriminate him. *State v. Dinsio* (1964), 176 Ohio St. 2d 460, 466. It is only when the witness had claimed his privilege not to incriminate himself and the prosecutor pursues a line of questioning incriminating to the defendant that the prosecutor is overstepping the bounds of proper examination under *State v. Dinsio.*

Even in those jurisdictions which condemn calling a witness knowing his intention to assert his privilege not to incriminate himself, there is no prejudicial error where the witness is not closely connected with the crime for which the defendant is on trial. There was no evidence ever presented actually linking Weiner to the conspiracy to murder Greene. His testimony might have revealed how the Nova was acquired by those who executed the bombing; without his testimony the implication was only that he had forged necessary signatures so as to facilitate the transfer to unknown individuals.

That Weiner mentioned he had been threatened was unanticipated and unfortunate. However, the court gave an instruction which sufficiently cured the effect of the outburst.

Assignment of Error No. VIII is not well taken.

ASSIGNMENT OF ERROR NO. IX:

IX. THE TRIAL COURT'S FAILURE TO PRECLUDE JOINDER OF THE DEFENDANTS IN A CAPITAL CASE CONSTITUTED AN ABUSE OF DISCRETION AND ERROR PREJUDICIAL TO EACH APPELLANT'S FUNDAMENTAL RIGHT TO DUE PROCESS OF LAW.

A. Antagonistic Defenses.

B. Unrelated Conspiracies—Stolen F.B.I. Documents.

C. Improper Hearsay—West Coast Tapes and Electronic Eavesdropping in Home of Co-Defendant Licavoli.

D. Evidence Unrelated to Conspiracy and Immaterial to Questions of Innocence or Guilt—Marconi Search.

E. Improper Attack of Character of Cisternino Occurring During Cross-Examination by Counsel for Co-Defendant Carabbia.

Crim. R. 14 provides:

If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in an indictment, information, or complaint, or by such joinder for trial together of indictments, informations or complaints, the court shall order an election or separate trial of counts, grant a severance of defendants, or provide such other relief as justice requires. In ruling on a motion by a defendant for severance, the court shall order the prosecuting attorney to deliver to the court for inspection pursuant to Rule 16(B)(1)(a) any statements or confessions made by the defendants which the state intends to introduce in evidence at the trial.

When two or more persons are jointly indicted for a capital offense, each of such persons shall be tried separately, unless the court orders the defendants to be tried jointly, upon application by the prosecuting attorney or one or more of the defendants, and for good cause shown.[14]

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14. The second paragraph of Crim. R. 14 presumptively supersedes R.C. § 2945.20 which recites the same standard for determining when a joint trial may be had for a capital offense.

As the defendants were charged with a capital offense, the prosecuting attorney filed a motion for a joint trial. The following seven causes were presented as grounds:

> (1) Defendants acted in concert in furtherance of a common goal or design.
>
> (2) The jury in a joint trial would be better able to weigh the testimony.
>
> (3) The testimony of the State's witnesses and exhibits would be identical in the trials of all defendants.
>
> (4) If the jury is given the complete picture of the plan or conspiracy, it would be better able to appraise the part, if any, each defendant had.
>
> (5) A joint trial would result in a fair, intelligent and complete submission of all evidence.
>
> (6) The State does not intend to use any statements of codefendants taken by law enforcement officers during the period of custodial interrogation.
>
> (7) The State anticipates using the testimony of witnesses who are in fear of death or serious bodily harm should their identity or whereabouts be known to the defendants before trial.

In discussing the necessity of showing good cause, the Supreme Court of Ohio stated in the decision of *State v. Abbott* (1949), 152 Ohio St. 228, 236:

> Since the applicable statute [R.C. § 2945.20, precursor of Crim. R. 14, ¶ 2] provides that persons jointly indicted for a capital offense shall be separately tried unless for good cause shown the court orders otherwise, the burden of showing good cause is necessarily upon the party or parties making the application for a joint trial, and such good cause must necessarily

be some operative factor not present in every case of joint indictments of defendants in capital cases. For instance, the additional time and labor required of the state or court, or the expense to the state, made necessary by separate trials, cannot be assigned or considered as good cause.

That defendants acted in concert in commission of a crime and that a jury in a joint trial would be better able to weigh the testimony and render justice are recognized grounds for granting a joint trial for a capital offense. *State v. Richardson* (1943), 39 Ohio Law Abs. 608, 612-613. The apparent hesitancy of the identification witnesses to reveal their identity and testify was an additional valid reason for granting a joint trial.

In the brief in opposition joined in by Cisternino and Carabbia, the possibility that defendants might set up antagonistic defenses was mentioned. However, neither in the brief nor oral arguments was it asserted that there was more than a possibility of antagonistic defenses. The mere apprehension of antagonistic defenses is not a sufficient basis for opposing a joint trial motion. *See Brady v. United States* (8th Cir. 1930), 39 F.2d 312; *People v. Yonder* (1969), 44 Ill. 2d 376, *cert. denied* (1970), 397 U.S. 975. Furthermore, none of the defendants actually asserted antagonistic defenses at trial. All presented alibis for the various key dates when there were alleged meetings and activity in furtherance of the conspiracy. The granting of a motion to try defendants jointly in a capital case remains within the sound judgment and discretion of the trial court. *State v. Fields* (1971), 29 Ohio App. 2d 154, 159-160. A review of all the matters before the court at the time of the hearing on the motion does not show that the trial court abused its discretion in ruling on the motion.

Although not raised as reasons for opposing the joint trial motion in the lower court, appellants claim that the introduction of certain evidence, *to wit*: testimony and documentary evidence relating to stolen F.B.I. documents, tapes of Fratianno's telephone conversations with Carabbia, tapes from electronic surveillance in Licavoli's home, fruits of the search of Marconi's residence and business, and attacks on Cisternino's character demonstrate error in that decision. The fact that during trial it might become apparent that it would have been in the interest of a complaining defendant to have had separate trials cannot be employed after trial to impair the correctness of the order when made. *State v. Bohannon* (1940), 64 Ohio App. 431, 432.

However, how the allegedly erroneous admission of evidence relates to the joint trial issue at all is unclear. Whether or not the evidence was admissible will be discussed below, as if separately assigned as error.

Appellants contend that the court should not have allowed the introduction of testimony concerning Mrs. Rabinowitz' theft of F.B.I. documents or of the stolen documents in an edited form as this evidence tended to establish an unrelated conspiracy. Mrs. Rabinowitz testified how she was recruited by Kenneth Ciarcia to supply lists of F.B.I. informants and information in their files on Licavoli, Liberatore and Lanci. Her testimony substantiated Aratari's on the relationship between Licavoli, Liberatore and Lanci, the group allegedly involved in the conspracy from whom he took direction. Mrs. Rabinowitz' account that in November of 1977, the month after Greene's death, Ciarcia asked her to secure F.B.I. information about Raymond Ferritto is indicative of a concern as to how the federal investigation of the Greene murder was progressing. Assuming *arguendo*, that the testimony was admissible, appellants contend the F.B.I. documents should have

been admitted in an unedited form. The documents sent to the jury had informants' names and some of the information about Licavoli deleted. The revelation as to what parties were involved and the information desired was what was important for purposes of the trial, not the documents themselves. Law enforcement authorities are privileged to maintain the confidentiality of informants' identities absent a showing of need. *See Roviaro v. United States* (1957), 353 U.S. 53. Need has not been demonstrated by appellants.

The admissibility of evidence derived from electronic surveillance of James Fratianno's telephone conversations is the subject of Assignment of Error No. XV. As to the admissibility of transcripts of taped conversations in the home of James Licavoli, the error claimed is that transcripts of the tapes should not have been substituted. Such was not the case. The court listened to the tapes while reading the transcripts before the evidence was presented to the jury and the decision was made to allow the jury to have copies of the transcripts while listening. Only the tapes were admitted into evidence and the jury listened to the tapes again during deliberations without the aid of the transcripts. The transcriptions were merely an aid in the presentation of evidence.

Appellants allege two errors in connection with the presentation of evidence relating to the searches of Carmen Marconi's residence and place of business. First, that Marconi, an electronics and television repairman, in the course of his legitimate occupation, would possess the items seized and they were not probative of a conspiracy to murder Greene. From the items seized, some of which would normally only be possessed by telephone company personnel, an electronics expert was able to demonstrate that a completely automatic system could be constructed to monitor telephone conversations by combining equipment

seized in the Marconi searches and the search of the manager's office at Greene's apartment. Among the items found were lists of F.B.I. and local law enforcement radio frequencies. Marconi had already been linked to the crime in Ferritto's testimony: he related how Cisternino said he would take some garbled tapes they were trying to clarify to Marconi, to see if he could solve the problem. Marconi was further connected to the conspiracy when, after Greene's death, he was observed at Licavoli's residence removing the equipment the F.B.I. was using to carry out electronic surveillance of conversations within the house.

Before the State elicited testimony concerning the Marconi searches, Cisternino's attorney challenged the admission of the evidence seized on grounds of relevance. The trial court asked the prosecuting attorneys to demonstrate the connection of the evidence to the issues in this case. A conference was held in chambers, over the objection of Cisternino's counsel that the discussions were not recorded. The prosecution related to the court off the record the nature of the evidence it was about to present; the court ruled it admissible, noting that the trial record itself would demonstrate if the Marconi search items were admissible. No prejudice accrued to Cisternino through this unusual procedure as the record clearly demonstrates the probative nature of the items seized in the Marconi searches.

The allegedly improper attack on the character of Cisternino occurring during the cross-examination of a witness by Carabbia's attorney is the subject of Assignment of Error No. XII and will be discussed thereunder.

As there was no abuse of discretion in allowing a joint trial and no prejudicial error in the admission of the evidence discussed above, Assignment of Error No. IX is overruled.

ASSIGNMENT OF ERROR NO. X:

X. THE TRIAL COURT'S REFUSAL TO PERMIT APPELLANTS TO DISCREDIT THE STATE'S CASE BY ELICITING EVIDENCE ON CROSS-EXAMINATION FAVORABLE TO THE DEFENSE CONSTITUTED AN ABUSE OF DISCRETION, WHERE THE COURT'S RULING PROHIBITED APPELLANTS FROM PROBING INTO THE INFLUENCE OF BIAS, PREJUDICE OR INTEREST OF KEY WITNESSES FOR THE STATE AND PRECLUDED APPELLANTS FROM PRESENTING EVIDENCE TO THE JURY OF ALTERNATE THEORIES OF THE CRIME TO THE PREJUDICE OF EACH APPELLANT'S FUNDAMENTAL RIGHT TO A FAIR AND IMPARTIAL TRIAL WITH DUE PROCESS AND COMPULSORY PROCESS OF LAW IN A STATE CRIMINAL PROCEEDING.

None of the citations given in appellants' brief relate to limitations on the cross-examination questions propounded to show bias, prejudice or interest. Two instances cited relate to limitations on cross-examination by Cisternino or Carabbia's counsel. As discussed under Assignment of Error No. V, the court foreclosed Carabbia's attorney from pursuing a line of questioning dealing with whether Frank Dovishaw, an associate of Ferritto, had been an informant. F.B.I. agent Robert S. Friedrick had indicated the area was outside the scope of his 28 U.S.C. § 16.22 authorization. For the reasons given under Assignment of Error No. V, the limitation cannot be asserted as error.

During cross-examination of Charles Berkey of the Cleveland Police Department Intelligence Unit, Cisternino's attorney elicited evidence that a search had been con-

ducted at the Fulton Fish Market. The witness was then asked whether or not a large cache of guns was found there. Objection to the question was sustained. Cisternino's attorney proffered a statement that a search of Fulton Fish Market was conducted because of the receipt of information that Lanci and Aratari met there and a cache of guns was found, contrary to Aratari's testimony. The trial judge correctly determined that such information did not serve to impeach Aratari's testimony and was not relevant.

Assignment of Error No. X is without merit.

ASSIGNMENT OF ERROR NO. XI:

XI. THE COURT ERRED IN REFUSING TO ALLOW THE DEFENSE TO SHOW THAT THE REPUTATION OF THE STATE'S CHIEF WITNESS FOR TRUTH AND VERACITY IS BAD.

Appellants cite no instances where their attorneys were foreclosed from showing that Raymond Ferritto's reputation for truth and veracity was bad. A reading of the nearly 7,000 pages of trial transcript reveals only two instances where this occurred. Licavoli's attorney sought to elicit from Ferritto himself his reputation for truth and veracity. Ferritto was not a proper witness to give this information. Calabrese's attorney sought to elicit Ferritto's reputation from F.B.I. agent Thomas K. Kimmel, Jr. No basis was established for the question.

Assignment of Error No. XI is without merit.

ASSIGNMENT OF ERROR NO. XII:

XII. THE INTRODUCTION OF EVIDENCE ATTACKING THE CHARACTER OF THE DEFENDANTS WITHOUT THE DEFENDANTS TAKING THE STAND OR ATTEMPTING TO PLACE THEIR CHARACTER IN ISSUE CONSTITUTES REVERSIBLE ERROR.

Appellants cite three instances where evidence attacking their character was erroneously admitted during the prosecution's case. The admissibility of testimony relating to the theft of confidential F.B.I. documents has been discussed under Assignment of Error No. IX.

A second instance occurred during the cross-examination by Carabbia's attorney of F.B.I. agent Douglas Domin. Domin was asked why during the search of the Willoughby Hills apartment, allegedly the place where Carabbia and Ferritto stayed the night before the bombing, gambling records were seized. Domin responded that in the affidavit in support of the search warrant it was stated that Kalman, the lessee of the apartment, and, he believed, Cisternino, had been convicted in federal court of a gambling charge. The court sustained Cisternino's objection and told the jury to strike the answer. Cisternino moved for a mistrial which motion was denied. Domin's answer was to be anticipated and Cisternino's attorney should have objected before the answer was given. The court gave a sufficient curative instruction. Furthermore, Cisternino's connection with organized gambling was already in the record. Louis Aratari testified, without objection, that he had been promised he could participate with Cisternino in the operation of a barboute game.

During the wide-open cross-examination of F.B.I. agent Anthony Riggio by Carabbia's attorney, evidence was elicited that Carabbia was arrested in connection with this

case while in Miami, Florida. Questioned as to why Carabbia was there, the witness stated it was his understanding Carabbia was in Miami "to fence" stolen goods. Cisternino's objection was overruled as was his motion for a mistrial. Cisternino's counsel requested an instruction for the jury to strike the testimony: the court told counsel he would give an instruction that the evidence related only to Carabbia. Carabbia's attorney objected and the court overruled the request of Cisternino's attorney. Carabbia's attorney opened the door to the response given. Since only Carabbia was said to have been in Miami to sell stolen property, Cisternino is in no position to claim that he was prejudiced by the statement.

Assignment of Error No. XII is without merit.

ASSIGNMENT OF ERROR NO. XIII:

XIII. THE INTRODUCTION OF TESTIMONY CONCERNING FINGERPRINT EVIDENCE WHICH WAS NOT PROPERLY AUTHENTICATED WAS VIOLATIVE OF FOURTEENTH AMENDMENT RIGHTS AND REQUIRES REVERSAL OF APPELLANT'S CONVICTION.

Cisternino claims that the examplar of his fingerprints used for comparison with the prints found on State's Exhibit 137-H, a Tennelec Memory Scan manual found in the Willoughby Hills apartment, was not properly authenticated. Kenneth Gressens, an F.B.I. fingerprint expert, testified to having matched one of Cisternino's known fingerprints with a print found on the manual. State's Exhibit 139-O, an enlargement of the fingerprints chart in question was introduced and used by Mr. Gressens for comparison purposes. Neither the introduction of the chart nor Gressens' testimony was the subject of objection. Cisternino's attorney extensively cross-examined the witness as to what items subjected to fingerprint comparison

did not contain Cisternino's prints. Only after the presentation of the State's case, when exhibits were being admitted, did Cisternino's counsel object that a foundation had never been laid for State's Exhibit 139-O. Assuming that counsel was referring to a failure properly to authenticate the examplar of Cisternino's fingerprints, the objection was waived. Counsel should have objected when the exhibit was introduced and testimony elicited from Gressens on the comparison of prints; he cannot object to the testimony at this late date. An appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected. *State v. Lancaster* (1971), 25 Ohio St. 2d 83.

Assignment of Error No. XIII is not well taken.

ASSIGNMENT OF ERROR NO. XIV:

XIV. THE PROSECUTOR WAS GUILTY OF MISCONDUCT, SUFFICIENT TO HAVE DEPRIVED THE APPELLANTS OF A FAIR TRIAL, BY CROSS-EXAMINING VARIOUS DEFENSE WITNESSES AS TO WHY THEY HAD NOT REPORTED THE SUBSTANCE OF THEIR EVIDENCE TO THE POLICE.

This assignment of error refers to the fact that the prosecutor asked certain alibi witnesses called by Carabbia and Cisternino why they had not reported their exculpatory evidence to any law enforcement authorities. No objection was made and explanations then were given by the various witnesses. Failing to object, the questions cannot be claimed to be prejudicial. *State v. Lancaster, supra.* However, the technique is an appropriate method of impeaching a witness' credibility.

Assignment of Error No. XIV is without merit.

ASSIGNMENT OF ERROR NO. XV:

XV. THE TRIAL COURT'S FAILURE TO EXCLUDE TELEPHONE CONVERSATIONS INTERCEPTED IN CALIFORNIA IN A TOTALLY UNRELATED FEDERAL INVESTIGATION CONCERNING ALLEGED OFFENSES ALIEN TO THE STATE'S CASE AND INVOLVING INFORMANT-DEFENDANT FRATIANNO CONSTITUTED AN ABUSE OF DISCRETION AND ERROR PREJUDICIAL TO EACH APPELLANT'S FUNDAMENTAL RIGHT TO A FAIR TRIAL WITH DUE PROCESS AND COMPULSORY PROCESS OF LAW, WHERE THE CONVERSATIONS WERE RECORDED IN VIOLATION OF MINIMIZATION ORDERS, DISCLOSED WITHOUT PRIOR JUDICIAL APPROVAL, AND APPELLANTS WERE PROHIBITED FROM PRODUCING EVIDENCE CAPABLE OF ESTABLISHING THE INNOCENT CHARACTER OF THE EVIDENCE.

Electronic surveillance of James Fratianno and others' conversations from a pay telephone in Sal's Expresso Cafe in San Francisco, California, was conducted under federal authorization in connection with an investigation of interstate theft of securities. U.S. District Judge William Orrick authorized the use in this case of tapes of three conversations of outgoing calls to Carabbia's home, following a request by the State of Ohio. In an August 23, 1977 conversation between Fratianno and Carabbia, Fratianno announced he would arrive the following afternoon. Their "friend from Erie" would be with Carabbia that next day. During a September 21, 1977 conversation, they discussed the necessity of having two unnamed individuals sit to-

gether at a game, a "big deal" and Fratianno's desire that Carabbia fly out the next day with Ray. A September 22, 1977 call to Carabbia's residence from the Cafe by two others was never completed due to a faulty connection.

Appellant Carabbia contended at the hearing on the motion to suppress the tapes that they were inadmissible since the recordings were made in violation of the minimization order that only calls of a business nature be monitored. The calls were of a business nature.

Carabbia also asserts, in connection with the Fratianno tapes, that he was prohibited from producing evidence which could establish the innocent character of the conversations. Such is not the case. During the voir dire examination of Samuel H. Williams, a San Francisco F.B.I. agent, Carabbia's attorney sought to elicit from the witness that another tape contained discussions of certain sports events to be marketed on the West Coast. The agent had not brought the tape of any such conversation with him.

All defense attorneys had earlier listened to various tapes and had access to the logs of all conversations intercepted. The logs indicated the subject of the conversations. During the course of the trial, defense counsel again surveyed the logs. At no point did Carabbia's attorney or any other defense counsel make a 28 C.F.R. § 16.22 application to the F.B.I., as described above under Assignment of Error No. V, or otherwise seek an order for the release of the tape in question despite knowledge of the proper procedure. *See* discussion under Assignment of Error No. V.

Assignment of Error No. XV is overruled.

ASSIGNMENT OF ERROR NO. XVI:

XVI. WHERE THE PROSECUTOR, IN HIS FINAL ARGUMENT, MAKES A FLAGRANT AND REPREHENSIBLE APPEAL TO THE PASSIONS AND PREJUDICES OF THE JURORS AND COMMITS OTHER ACTS OF GROSS MISCONDUCT, PREJUDICE AGAINST THE ACCUSED'S RIGHT TO A FAIR TRIAL IS SO HIGHLY PROBABLE THAT AN APPELLATE COURT WOULD NOT BE JUSTIFIED IN ASSUMING ITS NON-EXISTENCE.

Edward Walsh first gave closing arguments for the State followed by arguments of the five defendants. Carmen Marino then presented the State's final argument. Appellants contend that Mr. Marino's argument appealed to the passions and prejudices of the jury to such a degree that they were deprived of a fair trial.

Numerous instances of prosecutorial misconduct have been cited. Several times Marino mentioned his personal knowledge of the guilt of the accused. Personal opinions of guilt by the prosecutor are an impropriety to be avoided. *See State v. Stephens* (1970), 24 Ohio St. 2d 76, 82; *State v. Brand* (1978), 56 Ohio App. 2d 271, 273. He also interjected commentary which was not reflected in the record, *to wit*: that every former bombing incident had been carried out without prosecution, that the prosecution had not made a deal wih Vic Guiles, that Mitchell Guttenplan had been indicted, and that the defendants would not cast the blame for Greene's murder on Calandra as he was in jail with all of them. The prosecutor also stated that, as an Italian, he had knowledge that the organized crime organization to which defendants belonged was not fictitious. *See State v. Kiraly* (1977), 56 Ohio App. 2d 37, 50-51. He

also intimated that Anthony Liberatore would not live to be tried.

The role of an attorney in closing arguments is to assist the jury in evaluating and applying the evidence. The prosecutor here exceeded the bounds of propriety on numerous occasions. This is not to say that his comments were prejudicial *per se*. The test to be applied in evaluating the impact of prosecutor's comments on the jury is the following: Did the remarks of the assistant prosecutor naturally induce the jury to judge the case by considerations not present in, or suggested by, the evidence? *State v. Brand, supra* at 273-274; *State v. Carver* (1971), 30 Ohio App. 2d 115, 129, aff'd (1972), 30 Ohio St. 2d 280. The cases which have recently considered this issue do not analyze the impact of prosecutorial comments in isolation; rather, they consider the error in light of the entire trial.

In applying the above test to this trial, we find the remarks not so prejudicial as to warrant reversal for the following reasons. Although the prosecutor made numerous uncalled-for comments, they represent a rather brief, unfortunate performance during the course of a long closing argument and trial lasting over a month and a half. Most of the prosecution's closing argument was by co-counsel Walsh who gave an accurate and objective summation of the evidence. During the course of the trial, the jury had ample opportunity to become familiar with the personalities and trial techniques of all attorneys involved. It is not likely that a diatribe by any one of them would induce the jury to judge the case by considerations other than the extensive evidence presented. Where the record shows that the statements were aberrations in a prolonged trial and not cumulative evidence of a proceeding dominated by passion and prejudice, reversal would not promote the ends of justice. *United States v. Socony-Vacuum Oil Co.* (1940), 310 U.S. 150, 242.

Several other factors lead us to the conclusion that the closing arguments were not prejudicial. Although some of the comments referred to defendants' role in organized crime, neither Carabbia nor Cisternino was found guilty of engaging in organized crime. Cisternino's counsel objected to three of the comments and Carabbia to only one, indicative that they did not think the bulk of the argument improper at the time. Furthermore, for the most flagrant remarks, the court gave curative instructions, admonishing the jury to disregard the comments. Before closing arguments and during the charges, the court instructed the jury that closing arguments are not evidence.

Appellants rely on two cases where similar closing arguments by the prosecutor were found to be prejudicial error: *Berger v. United States* (1935), 295 U.S. 78 and *United States v. Garza* (5th Cir. 1979), 608 F.2d 659. In *Berger v. United States,* the case against the defendant was weak, depending entirely on the testimony of an accomplice; furthermore, the prosecutor had engaged in a course of misconduct throughout the trial. In *United States v. Garza,* the conviction was based heavily on the testimony of an informant and an undercover agent; the prosecutor's closing remarks consisted in large part of attempts to bolster those witnesses' credibility. The prosecutor's remarks in the court below were not of such character. Direct testimony of several witnesses and solid circumstantial evidence was presented constituting a strong case against appellants in particular.

In reaching this decision, we do not condone the remarks of the assistant prosecutor. As the State's attorney, he had a double burden to conduct the case zealously and at the same time assure that justice be done by complying fully with the rules of professional conduct by which he

was bound. *See* Code of Professional Responsibility, DR7-106 (C) (3) and (4).[15] However, his conduct was not so reprehensible as to deprive appellants of a fair trial.

Assignment of Error No. XVI is overruled.

ASSIGNMENT OF ERROR NO. XVII:

XVII. THE PROSECUTION'S CONCEALMENT AND MISREPRESENTATION OF FACTS SPECIFICALLY REQUESTED AS MATERIAL TO THE ISSUE OF GUILT OR PUNISHMENT RESULTED IN THE SUPPRESSION OF EXCULPATORY EVIDENCE AND THE PREJUDICIAL DENIAL OF EACH APPELLANT'S FUNDAMENTAL RIGHT TO A FAIR AND IMPARTIAL TRIAL WITH DUE PROCESS OF LAW IN A STATE CRIMINAL PROCEEDING.

Appellants allege that the prosecution concealed facts and documentary evidence exculpatory to them. Nothing in the record so indicates. Appellants refer to certain documents attached to their brief. A reviewing court cannot add matter to the record before it, which was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter. *State v. Ishmail* (1978), 54 Ohio St. 2d 402.

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15. *DR 7-106. Trial Conduct*

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(C) In appearing in his professional capacity before a tribunal, a lawyer shall not:

* * * * *

(3) Assert his personal knowledge of the facts in issue, except when testifying as a witness.

(4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein.

Assignment of Error No. XVII is not well taken.

Judgments affirmed in Cases Nos. 39894 and 39916.

It is ordered that appellee(s) recover of appellant(s) its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

/s/ SAUL G. STILLMAN
*Judge*

KRENZLER, *C.J.*, PATTON, *J.*, concur.

## APPENDIX I

### Final Argument by Assistant County Prosecutor Carmen Marino

**[9731]** The Court: Good afternoon, members of the jury.

You have heard all of the arguments by defense counsel, and as you know, the closing argument or final argument is concluded by the State of Ohio.

At this time we will hear from Mr. Marino.

Mr. Marino: Thank you, your Honor. Ladies and gentlemen, it is your province to handle the facts, so that the facts and evidence that are already presented to you are your jurisdiction, and there is no use me commenting on photographs and tapes that you are going to be able to listen to.

And granted, you have sat here a long time listening to us. You can appreciate the fact that it hasn't been too exhilarating for Walsh and I to sit over there and listen to all the accusations, and we are not going to dignify that, because we are not dealing in personalities here.

The people we are after are the people involved in organized crime. And these men have put a lot on you in the last two days, trying to shed some doubt in a case where there is none.

**[9732]** Now, we are not walking into an organized crime case with innocent citizens if we are not absolutely sure that these five men are guilty. And I am going to tell you now, from the facts, and from the day the investigation of this case began, there was no doubt in this case.

You know that surveillance started before Danny Greene was murdered. You know that the buggings went on before Danny Greene was murdered. You know that he was an informant. And if they claim we didn't put FBI agents on the stand, the one concession the State of Ohio made to the FBI was that we were not—

Mr. Willis: Objection. Concession they made to the FBI.

Mr. Marino: Your Honor, they have been given considerable latitude in this case. Now it is time for us to explain some of these things.

The Court: The objection is overruled.

Mr. Marino: The one concession we made to the FBI is that we would not have them take the stand and publically acknowledge that a certain individual—

Mr. Yelsky: Objection.

**[9733]** Mr. Willis: There is no evidence as to that.

Mr. Marino: (Continuing)—was an informant.

The Court: Overruled.

Mr. Marino: Now, whether you agree with that decision that was mine and Walsh's, is another matter.

The purpose of that, ladies and gentlemen, you have to be able to appreciate what an informant means to men like agents of the FBI and the Cleveland Intelligence Unit.

They are not all seedy characters. One individual, Bolo Dovishaw, was not brought in. He is an informant. They will never admit that to you or anyone else. To do that does irreparable damage to the likes of individuals that give them information.

Now, one of the major points in this case that shows we knew what these men were doing, we knew that they

were planning to kill Danny Greene. They had attempted it before. And they successfully completed the murder of Danny Greene and we couldn't stop it.

You recall the evidence from Kimmel. Not **[9734]** the—the toll charts themselves, not the large ones. The fact that they were drawn in November, early November, and they would go back six months. No more than that.

Now, those toll charts, ladies and gentlemen, for all of these men, before Ferritto turned himself in, before Ferritto made his December 4th statement, every one of these individuals had their Ohio Bell Telephone charts pulled before Ferritto fingered anyone. And that's important from this standpoint,—

Mr. Sperli: Objection. That wasn't in the testimony.

The Court: Overruled.

Mr. Marino: You have to recall what Kimmel said. I asked him when he pulled them. They were done in November. These men even acknowledge that there was no statement by Ferritto, he has never been associated with anyone in this case other than these individuals before November, 1977.

Mr. Sperli: Respectfully I object.

Mr. Marino: He never made a statement before December 4th.

Mr. Sperli: That wasn't the **[9735]** testimony.

The Court: Overruled.

Mr. Marino: He said they go back six months, that all the records were pulled of these individuals in November, with the exception of Ready's.

Now, if you recall what the surveillance was, every one of the people at this table, with the exception of

Cisternino, had surveillance on them. And the only reason we couldn't find Cisternino was because Cisternino was at the hideout that Ferritto could only describe but not pinpoint.

What I am telling you is that we knew they were trying to kill Danny Greene, and we couldn't stop it. And if that is an admission of failure, then that is a criticism we have always had with every bombing homicide case in this county.

Now, if you remember to call on your own experience and your own common sense and what your own life has shown you in this town, you know that these men have a distinct advantage over us. They know that no jury has ever sat on a bombing homicide in this county. Every bombing homicide has been a successful murder.

Mr. Willis: Objection. No evidence **[9736]** of that.

Mr. Giuliani: Objection.

The Court: The objection is sustained. The jury is instructed to disregard counsel's statement.

Strike it from your minds, ladies and gentlemen. It is stricken from the record.

Mr. Marino: Now, these men were trying to kill Greene and they did it. And we had their background, their toll charts pulled long before Ferritto fingered them. And this discussion I am going to give you right now is not so much on the evidence, but on how the evidence shows that we went about our investigation.

We went after Ferritto. The only evidence we had on Ferritto is that two witnesses who refused to identify themselves to us, and that we refused to pursue until we were absolutely sure we could guarantee their presence in

this courtroom, identified the driver, gave a description of the man in the back seat, and gave a description of the car.

As far as we were concerned, with Licavoli ordering the killing of Nardi and Greene, and the telephone taps and the surveillance, we knew who the people were who were involved. Our problem **[9737]** has always been getting the facts into the courtroom, getting the witnesses before people like yourselves.

Now, in that regard we also knew there was absolutely no way we would ever convict Ferritto. And I tell it to you from the standpoint of a lawyer and a prosecutor. The only evidence we had on Ferritto was that he was seen leaving Brainard Place. That's the only thing our witnesses could get in this courtroom. The only way, ladies and gentlemen.

And this goes to the principle that we just deal with anyone at any time. The only way you can get your foot in the door or [sic] organized crime is to deal with the creeps like the Ferrittos and Arataris. If we had a choice, they'd be right over there. And if we put them over there, ladies and gentlemen, the same arguments that were made against Ferritto would have been made against any witness we put here, and the same arguments in defense of the likes of that man Licavoli, who orders the deaths of other human beings, and that man who is seated right next to him, Mr. Carabbia—let's look up over here, while you are hiding behind your attorney.

Mr. Yelsky: I will object to that.

**[9738]** Mr. Giuliani: Objection.

Mr. Sperli: Objection.

Mr. Marino: And that man over there—

The Court: The objection is sustained.

Ladies and gentlemen, strike it from your minds. It is stricken from the record. And counsel is admonished not to engage in any such further remarks.

Mr. Marino: That man right there pulled the switch. So the two individuals seated together, ladies and gentlemen, right alongside one another, the man who orders the death and the man who does the killing, is the beginning and the end of this case. And everyone in between as far as the law is concerned is a co-conspirator.

The principals in this case, according to law, and the Judge is going to give it to you, the principals are Ferritto and Carabbia.

And yes, Ferritto lied. We knew they were trying to kill this man Greene. The only lie he told of any substance, ladies and gentlemen, is he switched the positions of Cisternino and Carabbia. And there was absolutely no doubt in our mind that **[9739]** all of these individuals involved in the killing of Danny Greene were involved somehow, but we needed a foot in the door somehow to show you just exactly what they did.

Now, we don't talk to juries this way all the time. We are not here to make friends. I am not going to talk to you about sympathy, like the defense tried to get in about family and children. I am not going to talk to you about punishment, like sending them away to jail or whatever they think is going to happen. Because if you would come down here more often, a lot of guys go to jail, because—

Mr. Giuliani: Objection.

Mr. Marino: Because guys like me and Walsh and the FBI send them there.

The Court: Overruled.

Mr. Marino: I am concerned about that. Because you had a morose look on your face when they brought this idea of children in. If you want to be sympathetic, you do it on your own time. We are here as far as the State is concerned to show you just exactly what those individuals did.

And those men could not stand up to us in open court. They couldn't even stand up to **[9740]** Danny Greene. Even if they made you dislike that individual, that guy was one tough Irishman, and they couldn't face him. They had to use men, surround his apartment, sneak down back alleys, use bombs to try and kill him. You can't imagine the number of times that man has been assaulted—

Mr. Willis: Objection.

The Court: Sustained. The jury will disregard what counsel has just said. Strike it from your minds, ladies and gentlemen. It is stricken from the record, and counsel is admonished not to engage in any such further representations.

Mr. Marino: Well, you know for sure he was bombed once in 1975. And that was not an accident.

Going back to Ferritto, as bad as he is, when he was apprehended, ladies and gentlemen, all he had was a record of being a burglar. No one knew that he did any killings.

And a part of the bargaining with him was that yes, we would agree it would be five years. But you have to understand what this deal is. We don't guarantee anything. Every deal we made, Fratianno, Ferritto and Aratari, is nothing more than a recommendation. No courts listen to us out **[9741]** of necessity, no court has to listen to us.

Mr. Yelsky: I will object to this.

The Court: Overruled.

Mr. Marino: The Judge that just overruled that statement is the one that makes the decision on our recommendation.

Now, they have tried to give you the impression that we just tell people what to do and they walk back out on the street after five years.

That is not true. Our agreements get turned down. And I can tell you this, if the Court turns down the agreement on anyone, like Ferritto, Fratianno or Aratari, as far as I am concerned we have lived up to our part of the bargain, and they deserve whatever they get. Because they are murderers just like these people. And we are not going to try to dignify any one of those individuals.

The likes of Ferritto when he takes that witness stand is telling you about organized crime. He is an individual involved in organized crime, and that's the only type of person that can tell you about it.

It is the same with Aratari; the same with Fratianno. Who else is going to tell a jury about organized crime, unless we put a creep on [9742] there just like these people? Aratari and Ferritto manifest what these individuals are.

Now, I can tell you this, that although these men have been presented in three-piece suits and white shirts, there is not one bit of evidence in this case, with the exception that Sinito worked as a bartender, to make these men in any way decent citizens.

Mr. Giuliani: Objection.

Mr. Sperli: Objection.

The Court: Overruled.

Mr. Marino: Everything that you have heard about property that these people say they have—corporations, amusement parks, apartment houses; they own it all. They own things, ladies and gentlemen. But before you own things you have to have the money. You must have worked sometime to get it, if you are going to be legitimate.

Now, consider Mr. Sinito. There are facts in this case, and there are witnesses that you can draw analogies with.

First of all, it is Sinito that is associated with Weiner. A used car dealer who had financial problems, whose company failed. Kechler, a used car dealer who had financial problems, whose **[9743]** company failed. Mendes and Guttenplan, under indictment—

Mr. Longo: Objection.

Mr. Giuliani: Objection.

Mr. Marino: That is in evidence, I believe.

Mr. Yelsky: It is not. I object.

The Court: It is not. It was stricken. I—

Mr. Marino: I beg your pardon. I asked Guttenplan's son—

Mr. Giuliani: Objection, your Honor. I ask that the prosecutor be admonished.

The Court: Just a moment. Come to the bench.

(Thereupon, Mr. Yelsky, Mr. Giuliani, Mr. Longo, Mr. Willis and both prosecutors approached the side bar, where a discussion was had out of the hearing of the jury, the court reporter and the defendants.)

The Court: I would admonish counsel to be extremely careful with statements of the evidence.

Ladies and gentlemen, insofar as counsel's last statement was concerned, you are instructed to disregard that

statement. Strike it from your minds. **[9744]** It is stricken from the record.

Mr. Marino: Another analogy you can draw is between the deaths of the two individuals that Licavoli ordered: Nardi and Greene. And rather than going over that data, you are going to have them with you, so there is no sense in anyone showing you photographs that you are going to see later, or playing tapes that you can listen to by yourself.

When Ferritto was apprehended, the decision was made rather than try the man who drove the getaway car, which as far as we are concerned is meaningless,—if you don't go after the big people in organized crime, if you don't go after Licavoli, Lonardo, Liberatore and Calandra, ladies and gentlemen, if you don't go after the big people it is meaningless to get the mechanics. So we lost nothing in our opinion. No one had a stitch of evidence on Ferritto as far as the killing of Petro is concerned. And if it is horrifying to you, ladies and gentlemen, then understand that we feel the same way. That's why we prosecute people for killing other human beings.

And if we dropped the ball a little on Ferritto, it is only because we never had any **[9745]** evidence on him until he admitted it.

Don't you think that it was somewhat of a hustle when we got Ferritto and we said "Did you kill?" making him think that we knew it? If he had been smart he would have said, "Go ahead and try me". And you think. On the evidence in this case, what did we have to convict Ferritto? You have to have a witness in organized crime who can point the finger at others.

Aratari gave us Liberatore, Lanci and Ciarcia. Understand, from all the testimony of handwriting samples, and

the fingerprint evidence, some of which you will have, a list of I believe—handwriting samples, I am not sure, or fingerprints. But you will have a list. Liberatore's name was on there, back in December.

These men try to make you try everyone except these defendants. The police are not on trial here. They try to drive a wedge between you and the law enforcement society. That is not right. You pay us to bring criminals to trial.

We are telling you now that there is absolutely no doubt. Not only that, we are telling you we are here because the State of Ohio is not budging one inch from that indictment.

**[9746]** We dealt with Fratianno, and we squeezed him, too.

Mr. Yelsky: I will object to this, your Honor.

The Court: Overruled.

Mr. Marino: We sat that man down—and he is an old man too, folks. We sat him down, and the agreement was, because he introduced Ferritto to Delsanter he was a part of the conspiracy, and we gave him the fine choice of sitting right next to his friend Jack White and going to trial in this case, if he thought he was innocent or there was a reasonable doubt, or to plead guilty to everything, the very charges we have here, take his five years from Ohio, and he has to testify against the organized crime family in Los Angeles.

Now, we have pushed this case as hard and as far as we can. And you should know that now, because you are going to deliberate on five people engaged in organized crime. And the next jury is going to have Calandra—

Mr. Willis: Objection.

Mr. Giuliani: Objection.

The Court: Sustained.

Mr. Marino: (Continuing)—and **[9747]** Lanci and Ciarcia. And we will try Liberatore and Marconi—

Mr. Willis: Objection.

Mr. Giuliani: Objection.

The Court: Sustained. Strike it from your minds, ladies and gentlemen. It is stricken from the record.

Mr. Marino: These men have told you they are trying to shed some reasonable doubt in this case.

There is in law the presumption of innocence that every person enjoys when they come to trial, and to enjoy that presumption of innocence, ladies and gentlemen, I could in this courtroom before you commit a crime and I would be presumed innocent.

There is one thing that the law does not entertain. There is no such thing as the presumption of reasonable doubt in any criminal case. Before there is reasonable doubt in a case, a jury must say so. And I am telling you now, we knew what these people were doing before they killed Greene, and we are telling you now the facts show it.

The deals we made, out of 14 people that are charged in this case, are strictly with **[9748]** Fratianno, Ferritto and Aratari. They ask about Guiles. We have not made a deal with Guiles.

Now, we don't just sit down, ladies and gentlemen, coldheartedly and start dealing strictly in terms of numbers. We feel the same moral compunction any human

being has when you sit down and listen to a man like Ferritto coldbloodedly admit that he murdered another human being. But that's what this case is all about.

Organized crime entails two major facets: the force to carry out whatever business they are engaged in, and corruption.

And you have that in this case, ladies and gentlemen. You have it directly in the way of Rabinowitz, and you have some insight into it when you have counsel for Mr. Carabbia trying to get in through State's witnesses that judges, cops and businessmen are going down to Miami with the likes of the murderer Carabbia.

Now, I don't care what family he has. He doesn't deserve any more sympathy than anyone else that comes into this courtroom. And the jails are filled with people who have families. And they are there because they are guilty. Not because juries looked at sympathy.

**[9749]** We told you when Mr. Walsh talked to you that their big emphasis was going to be placed on getting off Carabbia. That's why every witness, every piece of evidence, every attorney that talked to you in closing argument, concerned themselves with Carabbia not being in the back seat.

Now, let's face it. If their job is to protect their own client, if they are there representing only one individual, why are they concerned with Mr. Carabbia?

The evidence shows conclusively that that man pulled the switch. And the Judge is going to tell you in this case, ladies and gentlemen, that the man who pulls the trigger or switch and the man who drives the getaway car are principals. And if you don't convict the principals, it logically follows you can't convict anyone else. And

the State says that law fits this case like a glove. And we will go all or nothing on the argument that that man was in the back seat and he threw the switch.

You have Aratari, Ferritto and Spoth. And rather than go through the evidence, you have heard it all. They are gambling, by emphasizing his alibi and his case, that they can all beat **[9750]** the rap. And what we are asking you to do is, look at all the evidence, listen to the evidence of Licavoli talking on the tape, recall all the witnesses' testimony. Now, there is a lot of testimony to recall. But as you go to the physical evidence, when you pick up the pieces of evidence and look at it, that's going to assist you to recall what that person said, or what relevance it has to this case.

Remember things like Bonnarigo's photograph in Danny Greene's satchel. And Bonnarigo's, Marconi's and Cisternino's fingerprints on a Cleveland magazine at 919 Rondel.

And since no one has expressed an opinion as to how that mug shot of Bonnarigo got in Danny Greene's satchel, I will express an opinion. I think the law enforcement community gave it to him. I think they knew he was going to be murdered, or at least at attempt made on his life.

Mr. Willis: Objection.

The Court: Overruled.

Mr. Marino: And they gave him as much protection as they could.

And if you think Danny Greene is bad, fine. But he has a right to live just like anyone **[9751]** else. No one has a right to take his life except the State. And if he's done something wrong, then bring him into this courtroom and we'll try him, too.

As a matter of fact, we need some individuals like Greene. Even if they are given a little leeway in society. We are not saying every informant is a decent, honest person. How could we bring in a bank president, or somebody who works at a steel mill for 10 and 15 years, to tell you about organized crime? Not only is it absurd, it is impossible. Only criminals know about organized crime. Only murderers know what goes on in this society.

And when they try to tell you that it is a fictitious organization, folks, there are certain things that each person knows about his own background. No matter where you come from, no matter what your ethnic background is, you know there are certain things peculiar to your background.

And I can tell you this, that that organization is not fictitious. They determine what the membership is, and it is quite obvious. And that is not an ethnic slur.

These people are a monkey on the back of [9752] society, folks. These people are murderers. What should boggle the mind is that an attorney that attempts to defend one of these people gets up before you and says Tony "Dope" Delsanter is a fine, decent sportsman, a connoisseur of fine food. Men like Tony "Dope" Delsanter are a cancer in this society.

Now, you take a sober look at this case. Get off of this kick about sympathy. You know yourself they tried to persuade you that there is no gambling here. There is gambling equipment in Jack White's.

Jack White, James Licavoli, Vencento Licavoli. If we are all proud about being Italian, folks, let's use the right name, huh? Vincento Licavoli is his right name. And if he is proud at all about being Italian, use it, not an alias.

You know from your common background and experience that the courts every Monday morning are filled with gamblers. Nobody has any sympathy for them. No one tries to persuade them that they weren't caught gambling by the vice squad over the weekend.

And all of a sudden we charge these people with engaging in organized crime, because **[9753]** their gambling is on such a high level that it corrupts society, that they get to the judges, the prosecutors, yes, and the police.

Mr. Willis: Objection, your Honor. There is no evidence on that.

The Court: Overruled.

Mr. Marino: That stinks. And it is not brought out in the courtroom, because we, the law enforcement community, have been quite inept over the last 90 or 100 years in getting these people to trial.

That's why they feel so smug about getting up here before the witness Ferritto and cross examining the daylights out of him. Certainly we could have a field day with any person like Ferritto.

You must understand, that if you look at the cross examination of the individuals who are involved in organized crime, they knew almost as much about them as we did, if not more. They've got five of the conspirators. We have only presented two. They've got three more than we do.

You can see who they are putting the blame on. Anthony Liberatore, because he is not around.

Now, no one, no one who has any savvy about **[9754]** organized crime ever hears about a rap being put on someone as high as Anthony Liberatore if he's around to

defend himself. Do you actually believe that Anthony Liberatore is going to make it to trial?

Mr. Willis: Objection.

Mr. Giuliani: Objection.

Mr. Yelsky: Objection

The Court: Sustained.

Mr. Willis: I would ask for an instruction, your Honor.

The Court: The jury will disregard counsel's question. The jury will strike this rhetorical question from its mind. It is stricken from the record.

Mr. Marino: Well, let's look at it from the standpoint of other criminals in this case. Obviously John Calandra has done much more in this case than anyone else. Why don't they pin it on John Calandra, Licavoli's righthand man? The man who interceded between all the other individuals connected with this case. Why don't they put the rap on him?

Because he's in jail with them, folks. That's why. He is right across the hall here.

**[9755]** Mr. Willis: Objection, your Honor. There is no evidence of that.

The Court: Overruled.

Mr. Marino: They have attempted to make you challenge every person that wasn't brought in. That's like saying we are going to keep score of all the people who got bitten by dogs by recording all the individuals who were not bitten, and the remainder we will assume were bitten.

No investigation is carried out that way. You follow the facts where they take you, ladies and gentlemen.

And Ferritto did finger every one of these people. Every one of these people were fingered initially. Granted, he did switch the positions of Cisternino and Carabbia.

But let's face it, folks. Were they put in a dilemma? They claimed they didn't know anything about it. But yet counsel for Mr. Cisternino not only defends his own client, but he defends Jack Licavoli over there. They claim they didn't know the positions of the men in the car. Well, that's a lie right there.

Mr. Sperli: Objection.

**[9756]** The Court: Overruled.

Mr. Marino: Their only problem was, ladies and gentlemen, those attorneys couldn't tell us that without admitting their clients' complicity.

Mr. Willis: Objection.

Mr. Sperli: Objection. Absolutely—objection.

Mr. Willis: Move it be stricken.

The Court: Overruled.

Mr. Marino: So they know Carabbia was in the back seat. They know Cisternino was at Winchester.

Now, what counsel for Mr. Licavoli told you is true, we are not magicians. That whirlwind three-day defense they put on really had us scrambling, and I will admit that. They put two on from Cisternino, a couple from Sinito, and they bounced around to Carabbia. If you could have been above our room downstairs looking down, it would have been almost comical, the way we were running around trying to find out who these people were.

Now, all those witnesses came into this courtroom, all the alibi witnesses. No statements. Now, whatever you think about statements, ladies **[9757]** and gentlemen,—

Mr. Policy: Objection, your Honor. There was testimony the FBI talked to some of them.

Mr. Marino: I will get to that, your Honor.

The Court: Just a moment. The objection is overruled at this point.

Mr. Marino: The only evidence that we ever heard of that a witness was going to come in here and give alibi testimony was picked up by Goodwin, and he found out before Carabbia got to Gelanese. That's the one person that the FBI agent was able to talk to. And that was the end of March. Six months, ladies and gentlemen. Six months after that football game.

Now, there is a vein that runs through these so-called alibis that is somewhat synthetic. Every one, whether they are for Mr. Cisternino, Mr. Sinito, Mr. Lonardo or Mr. Carabbia, has some incident in their life that is so important they recall these individuals. Six months later. No statements. Never gone to the police.

And we are not ogres, ladies and gentlemen. We are the Goliaths of this world. Our job is to investigate crime, bring to you the people **[9758]** that have committed it, and ask you to convict them. And that's what we are doing in this case.

There is no reasonable doubt in this case. All this argument these defense attorneys have given you was for one reason: to conjure up in your mind some reasonable doubt.

The evidence in this case is overwhelming, even if it comes from the lips of a man like Ferritto, even if it comes from someone like Aratari.

Who else is going to tell us what these people do? This is not a situation where we go just picking people

out of society, bringing them into the courtroom and say, "Here, talk about organized crime". Who knows about that? And we did work on some of the defendants: Mr. Ferritto and Mr. Fratianno.

And I tell you this, I don't care what they say about police, what they say about prosecutors, what they say about agents. We are better than these people. We are stronger than these people. And when we sit them down we can find out what we want to know.

Now, we knew Ferritto was involved in this, ladies and gentlemen. His records, that are only supposed to go back six months, that we were **[9759]** only keeping six months' records on them, his records go back farther than six months.

Mr. Willis: Objection, your Honor. There is no evidence of this.

The Court: Overruled.

Mr. Marino: Don't look only at the charts. Because you are going to have them. That's why I say it is foolish for attorneys to get up here and start showing you things you are going to look at yourself. That is nothing but a waste of time.

But I will tell you, look at the charts and you will find Ferritto's go back almost ten months and Carabbia's go back about eight months.

Don't you think we watch people engaged in organized crime? That's right. We wiretap, with a warrant; we surveil, with a warrant; we bug places, with a warrant. The same Constitution that these men hide behind gives us the right to find out what they are doing. The same Federal Judge that regulates everyone's life, justifiably so under the Constitution, and we support that 100 per

cent, that same individual gives us the right to find out what people in organized crime are doing.

They have presented you arguments here **[9760]** trying to make this whole case a mystery. We don't expect you to solve anything. We are not walking into this courtroom asking you to solve anything at all, or clean up the streets. We are not budging from that indictment. They had one choice, ladies and gentlemen.

Now, let's look at it from a practical standpoint. They may have the right to a trial, but they had no choice here. Because we demanded this trial. We were the ones that forced them to trial. They didn't walk in here and say, "Let us see what evidence you have, we'd like to have a trial".

And what choice did they have? Trial or nothing, folks. That's what they had.

That's why we are here. We are so confident of the charges in that indictment that we are asking you to convict these five people. We are asking you to convict them of engaging in organized crime, because that's what they do. And if you need five people, you know there are three already, Fratianno, Ferritto and Aratari. Listen to the Judge on that point.

We are asking you to convict them on aggravated arson, because they did do a bombing **[9761]** of Danny Greene—the crime itself explains it—aggravated murder, perpetrated while committing aggravated arson, also perpetrated in killing for hire, and conspiracy.

The indictment and the facts of this case all go together. There is no doubt in this case. There was no doubt from the day we started picking you ladies and gentlemen. There is no doubt from the day we started presenting evidence.

And if they go to that argument, Well, if we hadn't caught Aratari we'd have never known that, well, you look at the evidence.

There was a very good picture of Cisternino that was excluded, totally excluded, when Mrs. Spoth first looked at the documents.

When I showed it her on February 16th, she looked at them, picked up Cisternino's, said "That's the one the papers say did it, but that's not right. This man is more like him, but I've got to see him in person".

Is that an unreasonable request? When they start asking you these rhetorical questions of would a person do this or that, ask yourself this: Would the average person, citizen, walk into this case, testify against these people, if they **[9762]** weren't absolutely sure? Read that questionnaire they filled out.

We were kept on pretty much pins and needles. Our order was that no one was to try and find out who those people are. We wanted them to come forward.

Mr. Willis: Objection, your Honor.

The Court: Sustained.

Mr. Marino: Those people had to make a very difficult decision. And they made it.

Now, if the average citizen can't come into the courtroom and tell you what's happened, then that's where the system breaks down.

They try to tell you that their alibi witnesses, because of what is at stake here, would come in voluntarily to help these people get off and to tell you the truth. Well, you don't know that. You don't know what those people are. And if we hadn't done some better checking on

Ready, you'd have believed him, too. He is just a ditch-digger.

How many people stayed at that hideout? Well, you know Calabrese, Cisternino, Bonnarigo and Ready are there. How many other people use that?

**[9763]** We never knew about that until Ferritto generally described it and they found it.

Ferritto also described Aratari and Guiles. And they were apprehended. By the same ogre, folks. Middleburgh Heights Police, but the same ogre. And Aratari had to be broken the same way as Ferritto and Fratianno were.

And what I am telling you here is pointblank and blunt. We are not trying to hussle anyone. No prosecutor, I don't think, has ever gotten up in front of a jury and said that they sat people down like Fratianno and Ferritto, knowing what they had done, and put this type of pressure on them to turn on these people. And that's what we did. Because we knew what they were doing.

We cannot get these cases into the courtroom unless a member of organized crime walks in here and tells you what's going on. That's the whole basis behind breaking organized crime. You will never find one decent defendant, one decent knowing witness—and I am talking about someone connected with organized crime—who can come into this courtroom and tell you about it. That's not the nature of organized crime.

Organized crime is made up of the maggots, **[9764]** the lice and the creeps of this society. And if we stink a little because we catch them, it is because we have to get down into the sewers, ladies and gentlemen, and pick them up and drag them into the courtroom.

And when they say we make deals, yes. We stink when we make those deals. But we can't do anything

else to catch these people but to make these deals. And Walsh and I made those deals to catch these people. And if the Judge doesn't take our recommendation, then that's fine, because there is that many more people in jail for what they have been doing.

They make it sound like men who are agents, law enforcement officers, attorneys for the State of Ohio, are nothing but a bunch of dealers with these men. We have no recourse. The choice is you either deal with them, get them into the courtroom, tell you people what these men are doing, support it with independent evidence to make you understand that not only do we believe it but the average citizen can believe it, and then ask you to convict.

This is no search for the truth. That's the most utterly ridiculous statement I ever heard, whether it came from a prosecutor or a defense **[9765]** attorney. If this were a search for the truth, ladies and gentlemen, it would be an investigation, and everyone who knows anything about it would cooperate, come forward and make statements.

We discovered the truth, no matter who tells it to you. And it is well-documented in the facts of this case. And we are asking you to believe it, we are asking you to convict these people, five people in organized crime.

This reasonable doubt they talked to you about. You listened to the Judge on that. You look at all that evidence. And don't make any decision until you listen to the tapes on Mr. Licavoli.

Then I ask you this. The first person you vote on, you vote on Carabbia. Because we are 100 per cent sure, from the time we knew he was involved in the—and that was before, ladies and gentlemen, before Mr. Ferritto

made his statement, because we had the toll record of every defendant pulled in this case before Ferritto turned State's evidence.

Mr. Policy: I am going to object to that, because there was no evidence to that effect.

The Court: The jury will rely **[9766]** on its recollection concerning the evidence.

Mr. Marino: Let's go back to one person's testimony, Kimmel. When I asked Kimmel when he pulled it, he said November, early November, I think that's what it was. With the exception of Ready; that was pulled in February. That's why those records are pulled.

And you can look at those charts and make whatever you want of them, but you can't get away from the fact that we knew these people were going to kill Greene, and we caught them at it. And we had to deal with someone in organized crime to show you ladies and gentlemen what they have been doing.

There is not much you can say about Greene. Except for the fact that I want to tell you we did not set him up. That man was murdered. That man would stand up to these people and anyone else as fearlessly as you can imagine. But because of that he left himself exposed. There was nothing anyone could do to protect Danny Greene.

He was as cocky and tough an Irishman as you want to find anywhere. And maybe he was a creep, ladies and gentlemen, but he was ten times better than these people, because from time to time he helped us.

**[9767]** Back off of this sympathy, get away from this idea that these people are being tried because they are ethnic.

They decided who made up that group over there, ladies and gentlemen. They pick the members of their gang. And you know just exactly what they are. And if we reek for having touched them, the stench comes from those defendants, that gang, those mobsters, not us.

And we are asking you to convict these five men on all counts, and both specifications of the aggravated murder charge. Because there is no doubt in this case. And every law enforcement agency connected with this case knows without any doubt—

Mr. Willis: Objection, your Honor.

Mr. Marino: (Continuing)—that these five men are guilty.

Mr. Giuliani: Objection.

Mr. Yelsky: I would object.

The Court: Sustained. The jury is instructed to disregard counsel's statement. Strike it from your minds, ladies and gentlemen. It is stricken from the record.

The decision as to who is guilty and who **[9768]** is not guilty is your ultimate decision, and not the decision of the prosecutors or defense counsel.

Mr. Marino: Certainly you didn't expect the State of Ohio and the defense to agree on anything. We approach it from the standpoint that we knew who did it, and we could show it to you, and we are asking you to act on that evidence. I thank you.

The Court: Thank you, Mr. Marino. Ladies and gentlemen, at this point argument is completed. We are going to take a brief recess, and then we are going into the final phases of the formal presentation of this case. This will be the Court's instructions to the jury, which we will undertake shortly.

## APPENDIX J

### Indictment

(Dated December 5, 1977)

COUNT I OF THE INDICTMENT

(AGGRAVATED ARSON)

Each of the defendants in this case is charged in Count I of the indictment with the offense of aggravated arson. Thus, it is set forth in that count that the defendants Cisternino, Carabbia, Licavoli, Lonardo, and Sinito, on or about October 6, 1977, in Cuyahoga County, Ohio, unlawfully and purposely and by means of fire or explosion, knowingly created a substantial risk of physical harm to Daniel J. Greene.

It will be recalled that the State proceeds against the defendant Carabbia as a principal offender, that is, one of the individuals who is charged as having been the immediate perpetrator of the crime of aggravated arson.

It will also be recalled that the State proceeds against the other defendants, that is, the defendants Cisternino, Licavoli, Lonardo, and Sinito as co-conspirators with the defendant Carabbia and the witness Ferritto, relative to the offense of aggravated arson, even though they are charged in the indictment and under law as principal offenders.

Before you can find the defendants guilty of the offense of aggravated arson, you must find beyond a reasonable doubt:

1. that on or about the 6th day of October, 1977, and in Cuyahoga County, Ohio, the defendant Carabbia and the witness Raymond Ferritto, by explosion;

2. knowingly created a substantial risk of serious physical harm to Daniel J. Greene.

The elements of aggravated arson are as follows:

1. by means of fire or explosion;
2. knowingly;
3. create substantial risk of serious physical harm to any person.

A person acts "knowingly", regardless of his purpose, when he is aware that his conduct will probably cause a certain result. A person has knowledge of circumstances when he is aware that such circumstances probably exist. An act is done "knowingly" if it is performed voluntarily and intentionally, and not because of ignorance, mistake, accident, or other innocent reason.

Since you cannot look into the mind of another, knowledge is determined from all the facts and circumstances in evidence. You will determine from the facts of this case whether there existed at the time in the mind of the defendant Carabbia and the witness Ferritto an awareness or belief that their acts and actions created a substantial risk of serious physical harm to Daniel J. Greene.

"Substantial risk" means a strong possibility, as contrasted with a remote or significant possibility, that a result may occur, in this case the infliction of serious physical harm upon Daniel J. Greene.

"Serious physical harm" means any physical harm which carries a substantial risk of death.

"Proximate cause", under the third element stated above, is an essential element of the offense of aggravated arson, proximate cause is an act or omission which in a natural and continuous sequence directly produced the

substantial risk of serious physical harm to Daniel J. Greene, as charged in the indictment.

If you find that the state proved beyond a reasonable doubt with respect to the defendant Carabbia all the essential elements of the crime of aggravated arson, your verdict must be guilty as to such defendant.

If you find that the state failed to prove beyond a reasonable doubt with respect to the defendant Carabbia any one of the essential elements of the crime of aggravated arson, your verdict must be not guilty.

The state proceeds against the defendants Cisternino, Lonardo, Sinito, and Licavoli in count I, aggravated arson, as co-conspirators with the defendant Carabbia and the witness Ferritto, it being contended by the state, under the evidence presented, that both of these individuals are principal offenders, as previously defined.

It will thus be necessary for you to determine, under the instructions previously given with respect to the concept of conspiracy, whether the defendants Cisternino, Lonardo, Sinito, and Licavoli entered into a conspiracy to kill Daniel J. Greene with Carabbia and Ferritto, whether all of the attributes of and requirements for a conspiracy and for membership therein have been established beyond a reasonable doubt as to the defendants; whether the alleged aggravated arson was knowingly perpetrated by defendant Carabbia and witness Ferritto in pursuance of the alleged conspiracy; and thus, whether or not the defendants Cisternino, Lonardo, Sinito, and Licavoli are chargeable and subject to punishment as conspirators for the act (aggravated arson) of their alleged co-conspirators, Carabbia and Ferritto, allegedly done during the existence of and in pursuance of the alleged conspiracy.

It will be recalled that a conspirator may properly, under law, be charged as a principal offender with respect to the offense (in this count, aggravated arson) committed by the co-conspirator-perpetrator in pursuance of the conspiracy.

Thus, if you find that the state proved beyond a reasonable doubt the commission of the offense of aggravated arson (each element thereof having been so proven) by defendant Carabbia and witness Ferritto; that said crime was committed by the said Carabbia and Ferritto in pursuance of and/or in fulfillment of a conspiracy with which one or more of the defendants, together with Ferritto, had knowingly and intentionally joined and associated themselves; and that all of the attributes of the concept of conspiracy which have been stated previously in these instructions, and which give rise to the criminal chargeability of conspirators for the criminal acts of their co-conspirators done during the existence of and in pursuance of the conspiracy are present; your verdict must be guilty as to such one or more of the defendants Cisternino, Lonardo, Sinito, and Licavoli, according to your findings with respect to each of such defendants.

If you find that the state failed to prove beyond a reasonable doubt any one of the essential elements of the crime of aggravated arson and the commission thereof and participation therein by the defendant Carabbia, not only must your verdict as to the defendant Carabbia be not guilty, but in such circumstances, your verdict, under the evidence of this case, must also be not guilty as to the defendants Cisternino, Lonardo, Sinito, and Licavoli.

## COUNT II OF THE INDICTMENT

## (AGGRAVATED MURDER)

Each of the defendants in this case is charged in count II of the indictment with the offense of aggravated murder with two (2) specifications. Thus, it is set forth in that count that the defendants Cisternino, Carabbia, Licavoli, Lonardo, and Sinito, on or about October 6, 1977, in Cuyahoga County, Ohio, unlawfully and purposely caused the death of another, to-wit, Daniel J. Greene, while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit aggravated arson.

In addition to the foregoing charge of aggravated murder, the indictment sets forth two (2) specifications. The first specification alleges that the offense of aggravated murder, as set forth in the above charge, was committed while the offender was committing or attempting to commit or fleeing immediately after committing or attempting to commit aggravated arson.

The second specification alleges that the offender committed the offense for hire. This would apply with respect to the acts and participation of the witness, Ferritto, who is contended by the State to have been a compensated co-conspirator and a participant in the alleged conspiracy herein.

It will be recalled that the State proceeds against the defendant Carabbia as a principal offender, that is, as one of the individuals who is charged with having been the immediate perpetrator of the crime of aggravated murder with two specifications.

It will also be recalled that the State proceeds against the other defendants, that is, the defendants Cisternino,

Licavoli, Lonardo, and Sinito as co-conspirators with the defendant Carabbia and the witness Ferritto relative to the offense of aggravated murder with two specifications, even though they are charged in the indictment and under law as principal offenders.

Aggravated murder, under the facts of this case, is the purposeful killing of another while committing aggravated arson. Before you can find the defendants guilty of aggravated murder, you must find beyond a reasonable doubt:

1. That Daniel J. Greene was a living person and that his death was caused by the defendants in Cuyahoga County, Ohio, on or about the 6th day of October, 1977;
2. That the killing was done purposely;
3. That the killing was done while the perpetrator or perpetrators were committing the offense of aggravated arson.

The elements of the offense of aggravated murder in this case are as follows:

1. Purposely cause the death of another;
2. While committing;
3. Aggravated arson.

The offense of aggravated arson has been previously defined in these instructions, together with the elements thereof.

One of the essential elements of the offense of aggravated murder is the requirement that the killing have been done "purposely". A person acts "purposely" when it is his specific intention to cause a certain result. It must be established in this case beyond a reasonable doubt at

the time in question there was present in the mind of the alleged perpetrators of the killing, that is, the defendant Carabbia and the witness Ferritto, a specific intention to kill Daniel J. Greene. "Purpose" is a decision of the mind to do an act with a conscious objective of producing a specific result—in this case, killing Daniel J. Greene, to do an act purposely is to do it intentionally and not accidentally. Purpose and intent mean the same thing. The purpose with which a person does an act is known only to himself, unless he expresses it to others or indicates it by his conduct.

The purpose with which a person does an act or brings about a result is determined from the manner in which it is done, the weapon or device used, and all other facts and circumstances in evidence. If physical damage or harm is inflicted upon a person with a deadly weapon in a manner calculated to destroy life, the purpose to kill may be inferred from the use of the particular weapon or device.

"Proximate cause" is an essential element of the offense of aggravated murder. Proximate cause is an act which in a natural and continuous sequence directly produces the death, and without which it would not have occurred. Proximate cause exists when the death is the natural and probable result of the act.

If you find that the state proved beyod a reasonable doubt all the essential elements of the crime of aggravated murder with respect to the defendant Carabbia, your verdict must be guilty as to such defendant.

If you find that the state failed to prove beyond a reasonable doubt any one of the essential elements of the crime of aggravated murder with respect to the defendant Carabbia, your verdict must be not guilty as to such defendant.

If you find the defendant Carabbia not guilty of aggravated murder, you will not consider whether or not he is guilty of either or both of the specifications set forth in the indictment.

If you find the defendant Carabbia not guilty, your verdict, under the evidence of this case, must also be not guilty as to the defendants Cisternino, Lonardo, Sinito, and Licavoli.

If, however, you find the defendant Carabbia guilty of the offense of aggravated murder, it is your duty to deliberate further, and to decide whether or not the defendant Carabbia is guilty of the charges set forth in either or both of the specifications beyond a reasonable doubt.

The question you will decide in the first specification of the indictment is whether or not the offense of aggravated murder was committed while the defendant Carabbia and the witness Ferritto, the alleged principal offenders and co-conspirators, were committing the offense of aggravated arson, as same has been defined and explained previously in these instructions. A finding or verdict of guilty relative to this first specification must be based upon evidence which convinces you of guilt beyond a reasonable doubt.

The question you will decide in the second specification of the indictment is whether or not the offense of aggravated murder, as charged, was committed for hire. This would, of course, embrace a determination as to whether the witness Raymond Ferritto, an alleged co-conspirator, with the defendant Carabbia and the other defendants, was compensated for his claim participation in the alleged conspiracy to kill and in the killing of Daniel J. Greene. A finding or verdict of guilty relative to this second specification must be based upon evidence which convinces you of guilt beyond a reasonable doubt.

As you will be instructed later in these instructions, your verdicts concerning the specifications will be separately found and entered on separate verdict forms.

As to the first specification, if you find that the state proved beyond a reasonable doubt, with respect to the defendant Carabbia, that the offense of aggravated murder was committed by the said Carabbia while he was committing the offense of aggravated arson, your verdict concerning the defendant Carabbia must be guilty as to the first specification.

If, however, you find that the state has failed to prove beyond a reasonable doubt, with respect to the defendant Carabbia, that the offense of aggravated murder was committed by the said Carabbia while he was committing the offense of aggravated arson, your verdict concerning the defendant Carabbia must be not guilty as to the first specification.

As to the second specification, if you find that the state proved beyond a reasonable doubt, with respect to the defendant Carabbia, that the witness and alleged co-conspirator, Raymond Ferritto, was compensated for his part in the killing of Daniel J. Greene, by his alleged co-conspirators, or any one of them, and that Carabbia was one of Ferritto's co-conspirators, your verdict concerning the defendant Carabbia must be guilty as to the second specification.

If, however, you find that the state has failed to prove beyond a reasonable doubt, with respect to the defendant Carabbia, that the witness Raymond Ferritto was compensated for his part in the killing of Daniel J. Greene by his alleged co-conspirators, including Carabbia, your verdict concerning the defendant Carabbia must be not guilty as to the second specification.

The State has proceeded against the defendants Cisternino, Lonardo, Sinito, and Licavoli in Count II, aggravated murder, as co-conspirators with the defendant Carabbia and the witness Ferritto, it being contended by the State, under the evidence presented, that both of these individuals are principal offenders, as previously defined.

If you find the defendant Carabbia guilty of aggravated murder, it will thus be necessary for you to determine, under the instructions previously given with respect to the concept of conspiracy, whether the defendants Cisternino, Lonardo, Sinito, and Licavoli entered into a conspiracy to kill Daniel J. Greene with Carabbia and Ferritto; whether all of the attributes of and requirements for a conspiracy and for membership therein have been established beyond a reasonable doubt as to the defendants Cisternino, Lonardo, Sinito, and Licavoli; whether the alleged aggravated murder was purposely perpetrated and committed in its several elements by the defendant Carabbia and witness Ferritto in pursuance of the alleged conspiracy; and thus, whether or not the defendants Cisternino, Lonardo, Sinito, and Licavoli are chargeable and subject to punishment as conspirators for the act (aggravated murder) of their alleged co-conspirators, Carabbia and Ferritto, allegedly done during the existence of and in pursuant of the alleged conspiracy.

It will be recalled that a conspirator may properly, under law, be charged as a principal offender with respect to the offense (in this count, aggravated murder) committed by the co-conspirator-perpetrator in pursuance of the conspiracy.

Thus, if you find that the state proved beyond a reasonable doubt the commission of the offense of aggravated murder (each element thereof having been so proven) by defendant Carabbia and witness Ferritto; that said crime

was committed by the said Carabbia and Ferritto in pursuance of and/or in fulfillment of a conspiracy which one or more of the defendants, together with Ferritto, has knowingly and intentionally joined and associated themselves; and that all of the attributes of the concept of the conspiracy which have been stated previously in these instructions, and which give rise to criminal chargeability of conspirators for the criminal acts of their co-conspirators done during the existence of and in pursuance of the conspiracy are present; your verdict must be guilty as to aggravated murder with respect to such one or more of the defendants Cisternino, Lonardo, Sinito, and Licavoli, according to your findings as to each of such defendants.

Upon a finding and verdict of guilty as to the defendants Cisternino, Lonardo, Sinito, and Licavoli in regard to the offense of aggravated murder, it is your duty to deliberate further and to decide whether or not the said defendants are guilty of the charges set forth in either or both of the specifications beyond a reasonable doubt.

The question you will decide as to the defendants Cisternino, Lonardo, Sinito, and Licavoli, in the first specification of the indictment, is whether or not the offense of aggravated murder was committed while the defendant Carabbia and the witness Ferritto, the alleged principal offenders and co-conspirators, were committing the offense of aggravated arson, as same has been explained and defined previously in these instructions. A finding or verdict of guilty relative to this first specification must be based upon evidence which convinces you of guilt beyond a reasonable doubt.

The question you will decide in the second specification of the indictment is whether or not the offense of aggravated murder, as charged, was committed for hire. This would, of course, embrace a determination as to whether the

witness Raymond Ferritto, an alleged co-conspirator with the defendant Carabbia and the other defendants, was compensated for his claimed participation in the alleged conspiracy to kill and in the killing of Daniel J. Greene. A finding or verdict of guilty relative to this second specification must be based upon evidence which convinces you of guilt beyond a reasonable doubt.

As you will be instructed later in these instructions, your verdicts concerning the specifications will be separately found and entered on separate verdict forms.

As to the first specification, if you find that the state proved beyond a reasonable doubt, with respect to the defendants Cisternino, Lonardo, Sinito, and Licavoli, that the offense of aggravated murder was committed by the said Carabbia and Ferritto; that any or all of these four defendants were co-conspirators with Carabbia and Ferritto as principals; that the aggravated arson was perpetrated during the course of and in pursuance of such conspiracy which any or all of these defendants had knowingly and intentionally joined and associated themselves with, and that all of the attributes of the concept of conspiracy which have been stated previously in these instructions, and which give rise to criminal chargeability of conspirators for the criminal acts of their co-conspirators done during the existence of and in pursuance of the conspiracy are present, your verdict must be guilty as to the first specification with respect to such defendant or defendants, according to your finding.

If, however, insofar as the first specification is concerned, and under the considerations set forth herein immediately above as to the defendants Cisternino, Lonardo, Sinito, and Licavoli, or any of them, you find that the state has not proven the guilt of said defendants, or any of them, beyond a reasonable doubt, your verdict as to

the first specification must be not guilty as to such defendant or defendants.

In regard to the second specification, if you find that the state proved beyond a reasonable doubt as to the defendants Cisternino, Lonardo, Sinito, and Licavoli, or any of them, that the offense of aggravated murder (of Daniel J. Greene) was committed for hire, that is, that the witness and alleged co-conspirator, Raymond Ferritto, was compensated for his part in the killing of Daniel J. Greene by his part in the killing of Daniel J. Greene by his alleged co-conspirators, or any one of them, that said offense was committed or perpetrated during the course of and in pursuance of a conspiracy which any or all of these defendants had knowingly joined and associated themselves with, and that all of the attributes of the concept of conspiracy which have been stated previously in these instructions, and which give rise to criminal chargeability of conspirators for the criminal acts of their co-conspirators done during the existence of and in pursuance of the conspiracy are present, your verdict must be guilty as to the second specification with respect to one or more of the defendants Cisternino, Lonardo, Sinito, and Licavoli, according to your findings.

If, however, insofar as the second specification is concerned, and under the considerations set forth herein immediately above as to the defendants Cisternino, Lonardo, Sinito, and Licavoli, you find that the state has not proven the guilt of said defendants, or any one of them, beyond a reasonable doubt, your verdict as to the first specification must be not guilty as to such defendant or defendants.

## APPENDIX K

### Affidavit of Special Agent E. Michael Kahoe Filed in the United States District Court for the Northern District of Ohio

(M77-252 filed December 5, 1977)

AFFIDAVIT

I, E. MICHAEL KAHOE, Special Agent, Federal Bureau of Investigation, hereinafter referred to as the FBI, being duly sworn, deposes and states as follows:

(1) The Affiant is employed as a Special Agent of the FBI and has been so employed for the past seven and one-half years. As a result of personal participation in this investigation, and as a result of reports made to me by other Special Agents of the FBI, I am thoroughly familiar with all aspects of the investigation.

(2) This affidavit, it is submitted, sets forth probable cause to believe that JAMES T. LICAVOLI, also known as JACK WHITE; JAMES T. FRATIANNO, also known as "Weasel"; JOHN P. CALANDRA; ANGELO LONARDO; RONALD CARABBIA; PASQUALE J. CISTERNINO, also known as "Butchie"; THOMAS JAMES SINITO; RAYMOND W. FERRITTO; ALFRED S. CALABRESE, also known as "ALLIE", and others as yet unknown, are associated in fact in an enterprise as defined in Title 18, United States Code, Section 1961 (4), the activities of which affect interstate commerce, to wit: a group associated in fact to control loan sharking and other criminal activities in Northern Ohio and to commit various criminal acts, including murder, threats involving murder, and conspiracy to murder, and participating directly and indirectly in the conduct of the enterprise's affairs through

a pattern of racketeering activity, including threats involving aggravated murder and felonious assault, felonies punishable by imprisonment for more than one year under the Ohio Revised Code, Sections 2903.1 and 2903.11, and Mail Fraud, in violation of Title 18, United States Code, Section 1341, and are conspiring to do so in violation of Sections 1962 (c) and (d) of Title 18, United States Code.

(3) The Affiant has learned through numerous conversations with other Agents of the FBI and through a comprehensive review of confidential information furnished by reliable informants to Agents of the FBI in Cleveland, Ohio, and elsewhere, that there exists within the United States an organized crime conspiracy which is controlled nationally by a membership which is exclusively Italian. Geographical areas of the United States are apportioned to the members of this conspiracy for the conduct of illegal activities. Within this organized criminal conspiracy there are "families" in charge of certain criminal activity in each geographical area. Each "family" is headed by a "capo" or boss the second in command is the "sotto-capo" or underboss. A "consiglieri" or counselor is typically an elder member who serves as an adviser. Various members of the "family" are controlled by an individual referred to as a "caporegima" or captain, who is responsible to the capo. The said criminal organization in the United States is controlled by a policy group known as the "commission". The "commission" members are actually the various bosses of the "families". This criminal organization is engaged in the conduct of gambling, loan sharking, extortion, murder, labor racketeering, and other violations of federal and state law.

(4) The Affiant knows through information received from numerous FBI Agents, who received said information

from confidential sources, that this organized crime organization referred to herein, is sometimes known as "The Outfit", "La Cosa Nostra" (LCN), or "our thing".

(5) The descriptive information of the following individuals, whose names appear herein, has been obtained by the Affiant through a review of reports of the FBI. Contained within these reports are confirmations regarding the addresses and other descriptive information of the individuals mentioned herein. This information was obtained through checks with the Identification Division of the FBI, with direct contact with officers of the Cleveland, Ohio, Police Department and other law enforcement agencies, and through contact with the Ohio Bell Telephone Company and the Cleveland Electric Illuminating Company.

(6) The following individuals are referred to herein:

ALFRED CALABRESE, also known as ALLIE, age 34, was last known to reside at 107 Evangeline Road, Cleveland, Ohio. ALFRED CALABRESE's arrest record shows convictions for Breaking and Entering (three convictions) and Armed Bank Robbery.

RONALD DAVID CARABBIA, born April 8, 1929, at Struthers, Ohio, 5'11", 180 pounds, brown hair, Social Security Number 301-22-3250, residence: 2277 Knollwood, Poland, Ohio, business: Crown Vending, 2719 Midlothian Boulevard, Ohio.

PASQUALE CISTERNINO, also known as "Butchie", age 38, resides at 924 London Road, Cleveland, Ohio. PASQUALE CISTERNINO's arrest record shows three convictions on Burglary charges.

TONY DELSANTER, also known as "Dope", deceased, resided at 373 Central Parkway, Warren, Ohio. TONY

DELSANTER's arrest record has convictions for Burglary and Larceny and Robbery.

JAMES T. FRATIANNO, born ALADENA T. FRATIANO, also known as "Weasel", on November 13, 1913, at Ripalimonsani Campobassi, Italy, residence: 400 California Avenue, Moss Beach, California.

JAMES LICAVOLI, also known as JACK WHITE, age 73, resides at 12301 Fairview Court, Cleveland, Ohio, with PAUL CIRICILLO, also known as PAUL LISH. JAMES LICAVOLI's arrest record shows a conviction for Blackmail.

ANGELO LONARDO, age 66, resides at 3121 Bremerton Road, Pepper Pike, Ohio. ANGELO LONARDO is married to a sister of JOHN T. SCALISH. ANGELO LONARDO has been convicted of Blackmail.

THOMAS JAMES SINITO, born September 18, 1938, at Cleveland, Ohio; 5'7", 175 pounds, black hair, brown eyes, Social Security Number 273-32-8371, residence: Garfield Heights, Ohio, arrested for Assault, Felonious Assault, Resisting Arrest.

(7) Confidential Source #1, named herein, has been a reliable source of the FBI in excess of ten years and has provided accurate and reliable information to Special Agents of the FBI concerning illegal activities of known criminals in the Cleveland, Ohio, area, and elsewhere, on at least two hundred occasions. This information has proven to be accurate and reliable in that it has been substantiated by independent investigation of the FBI and through information furnished by other confidential sources of the FBI.

(8) Confidential Source #1 became aware of the activities of JAMES LICAVOLI, also known as JACK WHITE, and others, through his personal association with,

and hearing statements made by, JAMES LICAVOLI, also known as JACK WHITE, LEO MOCERI, TONY DELSANTER, and ANTHONY MILANO.

(9) Confidential Source #1, who has admitted being a member of La Cosa Nostra, advised Special Agents of the FBI in July of 1967, he had learned through direct statements made by other members of La Cosa Nostra that JOHN T. SCALISH was the boss of the Cleveland organized crime family, and JAMES LICAVOLI, also known as JACK WHITE, LEO MOCERI, ANTHONY MILANO, and TONY DELSANTER were members.

(10) As early as December of 1967, Confidential Source #1 identified ANTHONY MILANO as the underboss of the Cleveland organized crime family.

(11) In March of 1971, Confidential Source #1 learned through statements made by LEO MOCERI in March of 1971 that LEO MOCERI, TONY DELSANTER and JAMES LICAVOLI, also known as JACK WHITE, were all involved in loan sharking activities in Ohio, and are in partnership with "BUTCHIE" CISTERNINO and EUGENE CIASULLO. LEO MOCERI expressed concern to Confidential Source #1 that Cleveland boss JOHN SCALISH had refused LEO MOCERI's request to approve assassination of potential witnesses against LEO MOCERI.

(12) In August of 1973, Confidential Source #1 advised he learned through statements made by LEO MOCERI in August of 1973 that ANTHONY MILANO, Cleveland underboss, was anxious to get his son, PETER JOHN MILANO, to return to Cleveland from Los Angeles and work with ANTHONY MILANO's nephew, Cleveland La Cosa Nostra member JOHN NARDI. According to LEO MOCERI, JOHN NARDI had five criminal associates who were killing people by putting bombs in their cars.

JOHN NARDI appeared to be making a play for leadership in the Cleveland organized crime family.

(13) In December of 1973, Confidential Source #1 advised that during the course of a discussion with LEO MOCERI, he learned that LEO MOCERI had $100,000 on the street in loan shark loans.

(14) In October of 1976, Confidential Source #1 advised that in October of 1976, he learned through statements made by JAMES LICAVOLI, also known as JACK WHITE, that TONY DELSANTER was avoiding as many people as possible. Confidential Source #1 advised that during the course of a conversation with JAMES LICAVOLI, also known as JACK WHITE, he learned that four Cleveland family members, who were not further identified, had aligned themselves with the "Irish mob" headed by DANNY GREENE. JAMES LICAVOLI, also known as JACK WHITE, described DANNY GREENE and his associates as a tightly-knit group who were utilizing explosives and other sophisticated weapons to attempt to gain control of criminal activities in Cleveland. JAMES LICAVOLI, also known as JACK WHITE, further stated that he and TONY DELSANTER are now convinced that they have to kill DANNY GREENE if they hope to remain in power.

(15) Confidential Source #2 has been a reliable source of the Cleveland Division of the FBI for more than ten years and has provided accurate and reliable information concerning illegal activities of known criminals in the Cleveland, Ohio, area, and elsewhere, on at least one hundred occasions. The information has proven to be accurate and reliable in that it was substantiated and corroborated by other confidential source information and by independent investigation by Special Agents of the FBI.

(16) Confidential Source #2, who resides in Northern Ohio, became aware of the illegal activities of JAMES LICAVOLI, also known as JACK WHITE, and others through personal association with, and through hearing statements made by, JOHN NARDI, ANTHONY PANZARELLA, DANIEL GREENE, and others. Information furnished by Confidential Source #2 has resulted in more than ten federal and local felony convictions.

(17) On September 15, 1976, Confidential Source #2 advised a Special Agent of the FBI, who in turn advised the Affiant, that during conversations with JOHN NARDI as recently as the week ending September 15, 1976, source determined that during the late evening of September 10, 1976, JOHN NARDI, while exiting the Italian American Brotherhood Club on Mayfield Road, Cleveland, Ohio, was shot at from two cars; each car containing two individuals. Confidential Source #2 advised that at least five shots had been fired at JOHN NARDI; however, he (NARDI) was not hurt.

(18) Affiant knows from personal investigation conducted by Special Agents of the FBI on May 17, 1977, results of which were made known to the Affiant, that on May 17, 1977, JOHN NARDI was killed at approximately 3:00 PM when a bomb contained in a vehicle parked next to JOHN NARDI's vehicle exploded as JOHN NARDI was attempting to enter his vehicle.

(19) The affidavit of Special Agent ROBERT S. FRIEDRICK of the FBI, executed November 7, 1977, in support of a complaint for the arrest of RAYMOND W. FERRITTO for a violation of Title 18, United States Code, Section 844 (h) (i), and the affidavit of FBI Special Agent ROBERT S. FRIEDRICK, executed October 28, 1977, in support of a search warrant of 3316 Greengarden Boulevard, Erie, Pennsylvania, and other locations, are hereby

incorporated by reference herein as if set forth fully in this affidavit.

(20) On November 11, 1977, RAYMOND W. FERRITTO surrendered in Pittsburgh, Pennsylvania, to the offense charged in the complaint referred to above.

(21) On December 3, 1977, and December 4, 1977, RAYMOND WILLIAM FERRITTO advised Special Agents of the FBI, who in turn have advised the Affiant of the following:

(22) RAYMOND WILLIAM FERRITTO advised that he is a long-time associate of JAMES "THE WEASEL" FRATIANNO from California, who, according to FERRITTO, is an LCN member. FERRITTO met with FRATIANNO in a downtown Cleveland, Ohio, hotel in the late summer of 1976. During dinner, FRATIANNO discussed in detail with FERRITTO the problems the Cleveland family of the LCN was having in controlling the town and the fight that the Cleveland LCN family and JAMES LICAVOLI, also known as JACK WHITE, was having with the JOHN NARDI-DANIEL GREENE group. FERRITTO was told by FRATIANNO that LCN MEMBER ANTHONY "THE DOPE" DELSANTER had a "job" for FERRITTO. FRATIANNO told FERRITTO that he was leaving town in the morning, but that he would be coming back through Cleveland on his way to the West Coast in a short time and that he would arrange a meeting between FERRITTO and TONY "THE DOPE" DELSANTER.

(23) Approximately two weeks later (late summer of 1976), FERRITTO was telephonically contacted at his residence in Erie, Pennsylvania, by FRATIANNO and told to drive to Warren, Ohio. That evening, FRATIANNO, FERRITTO, and ANTHONY DELSANTER met at Cherry's

Restaurant and Lounge in Warren, Ohio, to discuss the "job" that DELSANTER had for FERRITTO. FRATIANNO left the company of FERRITTO and DELSANTER after stating, "You two got business to take care of. I'll see you later." DELSANTER told FERRITTO that the NARDI-GREENE faction was attempting to take over, that the "family" was being hurt both physically and in reputation by the violence in Cleveland, and that NARDI and GREENE must be killed. DELSANTER told FERRITTO that the "contract" would have to be okayed by the boss, JACK WHITE, but that FRATIANNO had vouched for FERRITTO with DELSANTER. DELSANTER told FERRITTO at this meeting that he would be back in touch with him.

(24) Approximately one month later, believed to be September of 1976, FERRITTO was called to Warren, Ohio, by his close associate, RONALD CARABBIA, also known as R.C., of Youngstown, Ohio. A meeting was again held at Cherry's Restaurant and Lounge. Attending this meeting were ANTHONY DELSANTER, JAMES LICAVOLI, also known as JACK WHITE; RAYMOND FERRITTO, PASQUALE CISTERNINO, also known as "BUTCHIE", and RONALD CARABBIA. At this meeting, the "contract" for the "hit" on JOHN NARDI and DANIEL GREENE was given by JAMES LICAVOLI, also known as JACK WHITE, to RAYMOND FERRITTO. No specific fee was discussed except that LICAVOLI told FERRITTO, "You'd have all the money you need for a lifetime."

(25) Following this meeting with DELSANTER, LICAVOLI, CISTERNINO, and CARABBIA, FERRITTO spent the next several months attempting to find the right opportunity to kill both JOHN NARDI and DANIEL GREENE. During these attempts, FERRITTO found that both NARDI and GREENE were extremely cautious be-

cause of other attempts made on their lives. FERRITTO learned that at least three attempts on NARDI's life, two by gunfire and one attempt to bomb the car at the Cleveland Airport, were unsuccessful. These attempts, however, had made both NARDI and GREENE wary of any stranger. FERRITTO also learned that they were both now carrying guns. FERRITTO advised that he had learned of these attempts on the lives of NARDI and GREENE through conversation with PASQUALE J. CISTERNINO.

(26) FERRITTO demanded a "sit-down" to discuss his situation and "his contract" on NARDI and GREENE. In the spring, believed to be April 1977, FERRITTO met with the top LICAVOLI lieutenant, JOHN CALANDRA, RONALD CARABBIA, and PASQUALE CISTERNINO in Warren, Ohio. At this meeting, JOHN CALANDRA stated that he was speaking for LICAVOLI and told FERRITTO that they wanted NARDI and GREENE killed more than ever, and that FERRITTO still had the "contract" but that so did others and whoever got them first would be paid. FERRITTO was told that he would receive $20,000 for either hit or that he would be taken to Detroit by WHITE and made a member of "our thing", and given a 25 per cent cut of racket proceeds (including barbut, gambling and loan sharking) in the Warren-Youngstown-Cleveland area.

(27) FERRITTO advised that he had learned that JOHN NARDI had been killed in a bomb blast in May of 1977 and asked RONALD CARABBIA if the job had been done by "BUTCHIE" CISTERNINO, and CARABBIA told him that "Naw, 'BUTCHIE' belonged to 'the gang that couldn't shoot straight'."

(28) FERRITTO continued through the summer of 1977 to attempt to locate the perfect opportunity to kill DANIEL GREENE, but that due to circumstances, the

perfect opportunity did not present itself. In August 1977, FERRITTO attended the funeral of ANTHONY "THE DOPE" DELSANTER and sought out the opportunity to discuss the situation with JACK WHITE. JACK WHITE reaffirmed the contract on GREENE and told FERRITTO that JOHN CALANDRA had been speaking for him and the offer to join "our thing" by being sponsored by WHITE was bona fide. FERRITTO complained of the lack of cooperation and assistance that he was receiving in his search for GREENE and was told by WHITE that he should contact JOHN CALANDRA whenever he needed anything as CALANDRA was WHITE's right-hand man.

(29) Over the course of the summer of 1977, FERRITTO met between 20 and 25 times with JOHN CALANDRA, and CALANDRA provided the following help per instructions of JACK WHITE. CALANDRA had the telephone at the DANIEL J. GREENE residence taped for lead purposes. FERRITTO often complained that the tapes were too old to help him as it took two or three days for the tapes to get in FERRITTO's hands. When FERRITTO complained to CALANDRA or to "BUTCHIE" CISTERNINO, both of whom provided the tapes to him, he was told that the tapes came through ANGELO LONARDO, also known as "BIG ANGE", from THOMAS SINITO.

(30) During May of 1977, PASQUALE CISTERNINO and ALFRED CALABRESE provided an automobile to FERRITTO, which was a 1973 blue Plymouth. This car was given to FERRITTO with the explanation that he could have it because it had been seen in the Cleveland area on several occasions while CISTERNINO was going after NARDI or GREENE.

(31) In June of 1977, FERRITTO complained to JOHN CALANDRA about his out-of-pocket expenses and insisted that he needed some expense money. Two days

after this conversation with CALANDRA, RONALD CARABBIA gave FERRITTO $5,000 in cash and told him, "Here is the money CALANDRA gave me to give to you."

(32) In August of 1977, FERRITTO and CISTERNINO placed a "bomb box" in the bushes in front of DANIEL GREENE's apartment building. This box was made out of approximately 3/8 inch metal. The purpose of the box, according to FERRITTO, was that if they spotted GREENE coming or going from the apartment, that a bomb package could be placed in this metal container which was to serve as a blast director, as FERRITTO was told by CISTERNINO that dynamite blasts must be directed toward the victim.

(33) On December 4, 1977, affiant was advised by Lieutenant EDWARD KOVACIC, Cleveland Police Department, that during the week of November 21, 1977, officers of the Cleveland Police Department found in the bushes outside the front door of the apartment building at 15500 Lake Shore Boulevard, Cleveland, Ohio, a box made of approximately 3/8 inch metal, closed on five sides, which had legs composed of 6 inch spikes, welded to the box. A plastic container containing nuts and bolts was found inside this box. Lieutenant KOVACIC indicated that such a box could be utilized to direct the force of explosives.

Affiant was advised by another Special Agent of the FBI on December 4, 1977, that, the Special Agent of the FBI knows through statements made by DANIEL GREENE and personal observation that for approximately two years prior to his death, DANIEL GREENE resided at 15500 Lake Shore Boulevard, Cleveland, Ohio.

(34) RAYMOND WILLIAM FERRITTO continued to advise that on Monday or Tuesday, the first week in October, 1977, FERRITTO received a telephone call from RON-

ALD CARABBIA insisting that he come to Struthers, Ohio, to CARABBIA's vending company, as something very important was up. FERRITTO drove to Struthers, Ohio, and was taken by CARABBIA to a lake, believed to be Mosquito Lake, near Warren, Ohio. FERRITTO stated that this was an exclusive area and that you needed a plastic card to get through the gate and had boats and yachts along dockside. FERRITTO was taken to a boat believed to belong to a doctor where he met with JAMES LICAVOLI, aka., Jack White, JOHN CALANDRA, RONALD CARABBIA, aka., R.C., PASQUALE CISTERNINO, aka., Butchie, and ANGELO LONARDO, aka., Big Ange.

(35) FERRITTO advised that although the name of ANGELO LONARDO was familiar to him, this was the first time he had met LONARDO. On the boat, which was not taken out into the lake, a full discussion about the need to kill DANIEL GREENE took place with all those on the boat actively participating. Further, FERRITTO stated that he advised all those in attendance that he was dissatisfied with the lack of support he was receiving and that he did not wish to continue in his attempts to locate and kill DANIEL GREENE. In response to this, all those in attendance including ANGELO LONARDO advised him to continue his efforts and attempt to satisfy the contract. A tape recording taken from the GREENE wiretap was played, and it was noted that GREENE was to have a dental appointment with a dentist on Thursday, October 6, 1977. FERRITTO agreed to attempt to kill GREENE if he kept his dental appointment.

(36) On October 6, 1977, Special Agents of the FBI were advised by Doctor ALFONSO A. ROSSI, 29001 Cedar Road, Lyndhurst, Ohio, that DANIEL GREENE kept a dentist appointment with Doctor Rossi at 2:00 PM on October 6, 1977.

(37) FERRITTO further advised that on Wednesday, October 5, 1977 FERRITTO drove the 1973 blue Plymouth previously furnished him by PASQUALE CISTERNINO and ALFRED CALABRESE to Cleveland, Ohio, where he was met by CISTERNINO and taken to an apartment located near the Bishop Road exit off Interstate 90. This apartment building was described by FERRITTO as a high-rise with a fountain in the entranceway and the apartment number was 333. This apartment building was near a Gold Circle Department Store.

(38) On December 4, 1977, affiant was advised by Special Agent TED BAKER, FBI, that on December 4, 1977, he proceeded to Winchester Hills Apartments, 27400 Chardon Road, Willoughby Hills, Ohio, which is located near the Bishop Road exit off I-90. Located at this address is a 12-story apartment building with a fountain in the lobby. Personal observation by Special Agent BAKER revealed that apartment number 333 in that building is listed to Z. KALMAN. Special Agent BAKER further advised that a Gold Circle Department Store is located less than a half mile from the location of the apartment.

A review of records of the FBI, Cleveland Division, revealed that on September 17, 1975, PASQUALE J. CISTERNINO also known as "Butchie", and ZOLTON KALMAN, aka., Zolt, were both convicted in Federal District Court, Northern District of Ohio, before Federal District Court Judge THOMAS LAMBROS in connection with the operation of a gambling business located at the Library Club, Murray Hill Road, Cleveland, Ohio.

(39) FERRITTO further advised that PASQUALE CISTERNINO left FERRITTO in this apartment over the night of October 5, 1977. CISTERNINO returned to this apartment on Thursday, October 6, 1977, with dynamite, switches, and other electronic equipment. CISTERNINO

assembled a bomb in the presence of FERRITTO and explained in a step-by-step procedure how the "package" would be detonated by a remote control switch. FERRITTO and CISTERNINO left the apartment and CISTERNINO showed FERRITTO a Chevrolet Nova which had the door altered by someone who had welded a thick metal box in the door. CISTERNINO explained that this would work as a blast director similar to the box previously placed in front of the GREENE apartment building. The bomb package was carried in a shopping bag, and CISTERNINO drove the Nova and led FERRITTO and the Plymouth to the parking area of the office building which housed GREENE's dentist.

(40) The Chevrolet Nova was parked nearby, and CISTERNINO and FERRITTO watched for GREENE to enter the parking area. GREENE was not seen driving into the parking area, but was observed exiting an automobile and walking into the building where the dentist's office was located. FERRITTO drove the Nova and parked it in an adjacent spot to the automobile GREENE had been observed exiting. CISTERNINO and FERRITTO loaded the bomb package into the welded box in the door of the Nova and armed the bomb by switching a switch to the on position.

(41) FERRITTO then drove the 1973 blue Plymouth adjacent to a telephone booth where CISTERNINO pretended to be using the telephone. From that vantage point, FERRITTO and CISTERNINO observed the parking area waiting for GREENE to exit the building. When GREENE was observed approaching his car, CISTERNINO entered the back seat of the 1973 Plymouth and FERRITTO slowly pulled out into traffic. As GREENE entered his automobile, CISTERNINO detonated the bomb contained in the door of the Nova by activating the remote control

switch. FERRITTO and CISTERNINO then left the area and returned to the apartment where CISTERNINO was "dropped off" and FERRITTO returned to Erie, Pennsylvania.

(42) On Saturday, October 8, 1977, FERRITTO met with JACK WHITE in Warren, Ohio, where WHITE's promise of making FERRITTO a "member" was reiterated and WHITE said, "Now things maybe will settle down and we can make a buck."

(43) During July, August, September and early October, 1977, on four or five separate occasions FERRITTO met with THOMAS SINITO at the Denny's Restaurant located on Euclid Avenue, adjacent to Interstate 90. On these occasions, according to FERRITTO, he and SINITO discussed the tape recordings being furnished to him by JOHN CALANDRA and PASQUALE CISTERNINO. FERRITTO advised that he complained to SINITO that the tape recordings made from DANIEL GREENE's telephone were ineffective since they were coming to him (FERRITTO) late, and he was unable to utilize them in his efforts to locate and kill DANIEL GREENE. In response SINITO advised FERRITTO that the tapes were under the control of ANGELO LONARDO and it was only after LONARDO listened to them that they were released for FERRITTO's use. According to FERRITTO he told THOMAS SINITO on an occasion shortly before the GREENE bombing that he did not want to do the job since he was getting no support, and he was unable to formulate a suitable plan to locate and murder GREENE. On this occasion, SINITO insisted that FERRITTO continue his efforts since, according to SINITO, DANIEL GREENE was attempting to locate and kill SINITO.

(44) RAYMOND WILLIAM FERRITTO further advised that in early August, 1977, he attended the funeral

of ANTHONY DELSANTER in Warren, Ohio. There he met and conversed with JIMMY FRATIANO, who was also in attendance. FRATIANO asked FERRITTO how he was progressing in helping to solve Cleveland's problem. FERRITTO advised FRATIANO that things were not going well. Specifically, he told FRATIANO that he (FERRITTO) was not receiving the support from the Cleveland family that he had been told would be given.

(45) FERRITTO further advised that on August 24, 1977, he came to Cleveland, Ohio, and met with JIMMY FRATIANO, THOMAS RICCIARDI MICHAEL RIZZITELLI, also known as Mike Rizzo, MILTON HOLT, and ARCHIE ANDRIANO at a motel which he believes to be the Ramada Inn on Brookpark Road near Cleveland Hopkins International Airport. FERRITTO advised that this was primarily a social meeting; however, there was some discussion of JACK WHITE's "problem."

(45a) On December 4, 1977, RAYMOND FERRITTO advised a Special Agent of the FBI, who in turn advised the affiant, that in order to listen to the cassette tape recordings furnished to them by JOHN CALANDRA and BUTCHIE CISTERNINO, he purchased a cassette tape recorder sometime subsequent to the early part of August, 1977. FERRITTO advised that he purchased this tape recorder, manufacturer unknown, at what he believed to be the Uncle Bill's discount store on Lake Shore Boulevard, approximately seven or eight blocks east of the residence of a girl friend of DANNY GREENE. FERRITTO advised that he paid between $23 and $33 for this unit and recalled that it was black and measured approximately 6"x8"x2". He further advised that this unit could be operated on both standard AC current and batteries. FERRITTO further advised that after receiving several of the tape recordings he was unable to determine what was being said on these

recordings through this machine as the speed of the recording was not compatible with the playback on his machine. FERRITTO stated that he discussed this problem with BUTCHIE CISTERNINO who subsequently advised him that he would discuss the problem with CARMEN MARCONI to "see what the problem is."

FERRITTO advised that sometime later he met BUTCHIE CISTERNINO at the residence of RONALD CARABBIA in Struthers, Ohio, at which time CISTERNINO gave him another tape recorder similar in size, but he recalled that this one was manufacturered by Sony. FERRITTO further stated that he utilized this tape recorder through the AC current at his hotel rooms which he utilized at the Ramada Inn, the Sheraton Inn, and the Holiday Inn, all in the vicinity of Euclid Avenue and Interstate 90 on the eastern outskirts of Cleveland, Ohio.

(45(b)) FERRITTO further advised that he was told by JOHN CALANDRA that JACK WHITE would review some of the tapes at his (JACK WHITE's) brother's house at Warren, Ohio. Investigation conducted by other special agents of the FBI, who in turn have advised the affiant, that JACK WHITE'S brother, JOHN LICAVOLI, lives at 1365 Westwood Avenue, Warren, Ohio. Special Agents of the FBI have seen JACK WHITE at his brother's residence as recently as October 13, 1977.

(46) On December 4, 1977, affiant was advised by other Special Agents of the FBI that on August 10, 1977, United States District Court Judge ROBERT SCHNACKE, Northern District of California, entered an order authorizing the interception of wire communications over telephone number (415) 441-9580 for a thirty day period.

(47) Pursuant to that Order, agents of the San Francisco, California Division of the Federal Bureau of Investi-

gation monitored telephone calls to and from telephone number (415) 441-9580. On August 23, 1977, at 5:48 PM, Pacific Daylight Time, the following telephone conversation was monitored. The individual referred to as FRANK in the following transcription has been identified by Special Agents of the FBI, San Francisco Division, as FRANK VELOTTA and the individual referred to as JIMMY in the following transcription has been identified by Special Agents of the San Francisco Division as JIMMY FRATIANO.

FRANK Nothing. We're just talking. Where am I at—

I'm in Cleveland, where do you think I'm at?

RON (unintelligible) how's the weather?

FRANK How's the weather, it's always nice over here.

RON How's business?

FRANK Huh?

RON How's business?

FRANK How's business? Bad.

RON (unintelligible)

FRANK Huh? All right, why?

RON (unintelligible)

FRANK Jesus Christ, my my, hey that guy's coming in, uh, wait a second.

JIMMY How's it going?

RON All right.

JIMMY (laughs) How's everything going?

RON All right.

JIMMY Huh?

RON All right.

JIMMY Yeah.

RON Yeah.

JIMMY Listen, I'm going to be in tomorrow night at 5:10.

RON Up above.

JIMMY Tell Archie to pick me up.

RON Does he know where?

JIMMY Well, he knows where, yeah, you know that, that airport over there.

RON Yeah.

JIMMY The big one.

RON Oh, yeah.

JIMMY At 5:10. Tell him I'm coming in United.

RON United, 5:10, tomorrow afternoon.

JIMMY Yeah.

RON Okay

JIMMY All right

RON Yeah, that's fine.

JIMMY Get a hold of that friend, you know.

RON (unintelligible) yeah, well, he'll be there.

JIMMY The dark guy.

RON Huh?

JIMMY The dark guy.

RON Yeah.

JIMMY Will he be there?

RON Yeah.

JIMMY All right. He'll be there and we'll go right to his place.

RON (unintelligible)

JIMMY To his house, you understand?

RON Right.

JIMMY Oh, okay. I'm going to have somebody with me.

RON (unintelligible)

JIMMY All right?

RON Yeah.

JIMMY Okay. Where is our friend from Erie?

RON He'll be with me tomorrow.

JIMMY Will he?

RON Yeah.

JIMMY Okay, then, uh. . .

RON (unintelligible) ARCHIE'll let you know, you know?

JIMMY Okay, then, we'll get a hold of you sometime tomorrow night

RON He'll know where we're at

JIMMY Well, why don't, why don't he come in town?

RON He is.

JIMMY Huh?

RON He is.

JIMMY Tomorrow?

RON Yeah

JIMMY Okay, then, I'll be over there then.

RON Okay.

JIMMY All right, buddy.

RON All right.

JIMMY Bye.

(48) The above telephone call was outgoing from (415) 441-9580. The individual on the receiving end of the call referred to in the transcript as RON, is believed to be RONALD CARABBIA. The telephone number called, according to a mechanical device which was installed pursuant to an order of Judge SCHNACKE on August 10, 1977, the purpose of which was to identify the telephone numbers called from the monitored telephone, was (216) 755-9585. Records of the Ohio Bell telephone Company and independent investigation by the Federal Bureau of Investigation indicate that (216) 755-9585 is a non-published listing to RONALD CARABBIA, 2277 Knollwood Drive, Struthers, Ohio, formerly 124 Knollwood Drive, Struthers, Ohio.

(49) On August 24, 1977, a physical surveillance conducted by Special Agents of the FBI, the results of which were made known to the affiant, revealed that JAMES FRATIANO arrived at Cleveland, Ohio, from San Francisco, California via United Airlines flight number 72. FRATIANO was accompanied by other individuals and was met by ARCHIE ANDREANO.

(50). Affiant states that from August 24, 1977, until October 10, 1977, a twenty-four hour surveillance was conducted in the vicinity of 12301 Fairview Court, Cleveland, Ohio, by Special Agents of the Federal Bureau of Investigation, the results of which were made known to affiant which revealed the following:

September 2, 1977

10:58 p.m. - JAMES LICAVOLI, aka., Jack White, arrives at 12301 Fairview Court, Cleveland, Ohio, on foot from the direction of Murray Hill Avenue and enters the side door of that residence.

11:47 p.m. - A white male, balding, driving a white vinyl over light blue General Motors product, bearing current Ohio license DZ 653, parks in the driveway of 12301 Fairview Court. The driver exits the vehicle and enters the residence.

September 3, 1977

12:10 a.m. - White male driver of DZ 653 exits the residence, enters DZ 653 and exits the area.

September 4, 1977

12:22 p.m. - A white over blue Cadillac, current Ohio license DZ 653, parks in the driveway of 12301 Fairview Court. A white male, white hair, balding with a red shirt, believed from previous observation of photographs to be identical to JOHN CALANDRA, exits DZ 653 and enters the residence.

12:31 p.m. - JAMES LICAVOLI, aka., Jack White, exits 12301 Fairview Court, Cleveland, Ohio, and enters the passenger side of DZ 653 at the same time the individual believed to be JOHN CALANDRA exits the residence and enters the driver's side of DZ 653. CALANDRA and LICAVOLI are observed exiting the area. A check of the Law Enforcement Automated Data System by Special Agent GEORGE E. GROTZ on September 4, 1977, revealed that current Ohio license DZ 653 is listed to the Royal Machine Tool Company, 700 East 163rd Street, Cleveland, Ohio, on a 1976 Cadillac, four-door sedan. Investigation conducted by other Special Agents in the FBI, who in turn have advised Special Agent GROTZ, who has advised affiant, revealed that the President of Royal Machine and Tool Company is JOHN PHILLIP CALANDRA who, according to the most recent published records, resides at 700 Quilliams, Cleveland Heights, Ohio. Further, Special Agent GROTZ advised affiant that a spot check of the residence at 700 Quilliams conducted by other Special Agents of the FBI, who in turn advised Special Agent GROTZ, revealed that between the hours of 4:20 p.m. and 5:30 p.m., on September 4, 1977, the white over blue Cadillac, bearing current Ohio license DZ 653, was observed parked in the driveway of the residence at 700 Quilliams, Cleveland Heights, Ohio.

October 7, 1977

12:50 p.m.—JACK WHITE is observed to enter the residence of 12301 Fairview Court, Cleveland, Ohio.

1:36 p.m.—JOHN CALANDRA arrives at 12301 Fairview Court on foot.

4:45 p.m.—CALANDRA exits 12301 Fairview Court.

October 8, 1977

10:53 p.m.—JACK WHITE is observed to enter the residence of 12301 Fairview Court.

11:45 a.m.—JOHN CALANDRA is observed to enter the residence.

2:28 p.m.—CALANDRA is observed to leave the residence.

October 9, 1977

10:45 a.m.—JACK WHITE is observed to enter the residence of 12301 Fairview Court.

11:29 a.m.—JOHN CALANDRA is observed to enter the residence.

3:52 p.m.—JOHN CALANDRA is observed to exit the residence.

(51) On August 26, 1977, Chief Judge FRANK J. BATTISTI, United States District Court, Northern District of Ohio, entered an order authorizing interception of oral communications occurring in the premises located at 12301 Fairview Court, Cleveland, Ohio, for a thirty-day period.

(52) At 1:35 p.m., September 24, 1977, JAMES T. LICAVOLI, also known as Jack White, was observed in front of the residence at 12301 Fairview Court, Cleveland, Ohio, exiting a yellow Cadillac automobile bearing current

Ohio license plates NK 860. He was then immediately observed entering the residence of 12301 Fairview Court, Cleveland, Ohio, by the side entrance. On September 24, 1977, according to other Special Agents of the Federal Bureau of Investigation, who in turn advised the affiant, at 7:17 p.m., a white male entered the residence of 12301 Fairview Court, Cleveland, Ohio. This individual was described as being approximately 55 years old, 5′8″ to 5′9″, 150 pounds, thin, gray hair. At 7:19 p.m., a white male, identified by the surveilling Agents as STEVE CALA, departed the residence of 12301 Fairview Court, Cleveland, Ohio. At 7:38 p.m., PAUL A. CIRICILLO, also known as Paul Lish, departed the residence of 12301 Fairview Court, Cleveland, Ohio, and entered a white Ford LD, current Ohio license AD 7047, which at the time was parked in the driveway of the residence. LISH was observed exiting the area in this vehicle.

(53) On September 24, 1977, between the hours of 7:31 p.m. and 8:17 p.m., the following conversation between two individuals was intercepted at 12301 Fairview Court, Cleveland, Ohio. Special Agent GEORGE E. GROTZ states that he has reviewed this conversation in excess of 25 times and advises the affiant that the following is the truest account of that conversation:

"JOHNNY NARDI . . . that cocksucker . . . if the guy . . . is good, you know we'll send a letter to the police department telling them what do you want . . . best forget about it. You know, the only mistake I made is when I left my man out at the Innerbelt . . . I should never have told JOHNNY about it . . . I shoulda gone ahead and done it myself and . . . who the hell is gonna hassle a cop? Nobody. Kids. That's the way . . . you wanna be honest and ah . . . how the hell did this guy ever come in the picture . . . you can't get near him . . . they got permits to

carry guns . . . you know the Irish. If he says I'll be there at three o'clock . . . who gives a shit. You wait, you wait and wait and you get tired of waiting. He don't keep no time . . . he goes down . . . in the wintertime he goes to . . . Oh, he's gotta make a mistake. He gotta go sometime. I hope he goes back to Texas so they can kill him. Where? Texas . . . cocksuckers on the West Side, they all go with him. You know them . . . MC TAGGART and all. That guy who used to work for you at the barbut game. He don't go with 'em. You know that guy . . . that you're the one who give the job. No he was working with us. I mean you're the one who give the job out . . . what's his name . . . yeah . . . he used to work for FRANK . . . he used to work for the barbut game . . . JOHN NARDI's the one who opened the barbut game. He said, boy, the Irishman wanted to give me a piece . . . I don't want nothing. You get the idea the lie they was . . . you know when he was talking to you . . . NARDI . . . he would never look at you. He was a phoney motherfucker . . . He got to smirking. He never did try to get in touch with them little what's his name, TONY . . . tells me you want anything done, you get a hold of JACK. TONY DELSANTER . . . before he used to play golf he was a phoney motherfucker . . . yeah, it all comes back to you . . . what are you gonna do with any kind of guy . . . he coulda, he was going to get in, too. He had something on his mind . . . I don't know what he had on his mind. He had something on his fuckin mind. Maybe it was not the bombing . . . shook everybody down . . . killed a lot of people . . ."

(54) On September 29, 1977, Special Agent THOMAS J. WILSON observed a photograph of JOHN PHILLIP CALANDRA and advised that the individual identified as JOHN PHILLIP CALANDRA in the photograph, to the best of his knowledge, appears to be identical to the individual who entered the residence of 12301 Fairview Court, Cleveland, Ohio, at 7:17 p.m., on September 24, 1977.

(55) Affiant further states that he has reviewed the surveillance log containing the above information and, based upon a review of that log, states that JAMES T. LICAVOLI, also known as Jack White, and the individual identified as JOHN PHILLIP CALANDRA were the only individuals in the residence at the time the above-described conversations took place.

(56) Special Agent GEORGE E. GROTZ advised the affiant that based upon personal investigation and investigation conducted by other Special Agents of the Federal Bureau of Investigation, who have in turn advised Special Agent GROTZ, that the following statements summarize the above conversation set out in paragraph 53.

JAMES T. LICAVOLI, also known as Jack White, and the individual identified as JOHN PHILLIP CALANDRA are initially discussing JOHN NARDI, both of them speaking in derogatory terms of NARDI. There is reason to believe they are discussing their involvement in the bombing of JOHN NARDI on May 17, 1977, when the conversation, "You know the only mistake I made is when I left my man out at the Innerbelt. I should never have told JOHNNY about it . . . I shoulda gone ahead and done it myself and . . . who the hell is gonna hassle a cop?" is overheard. Both JAMES T. LICAVOLI, also known as Jack White, and the individual identified as JOHN PHILLIP CALANDRA then discuss "the Irishman" and that they believe that "the Irish" have permits to carry guns. It is also clear to the affiant that JAMES T. LICAVOLI, also known as Jack White, and the individual identified as JOHN PHILLIP CALANDRA are discussing the possibility that "the Irishman" will "make a mistake" and "he gotta go sometime." These statements are believed by the affiant to be a reference to an anticipated trip by "the Irishman" to Texas, and the phrase, "I hope he

goes back to Texas so they can kill him" is heard and is believed to refer to associates of JAMES T. LICAVOLI.

The preceding paragraphs, it is submitted, sets forth probable cause to believe that JAMES T. LICAVOLI, also known as Jack White; JAMES T. FRATIANNO, also known as "Weasel;" JOHN P. CALANDRA; ANGELO LONARDO; RONALD CARABBIA; PASQUALE J. CISTERNINO, also known as "Butchie;" THOMAS JAMES SINITO; RAYMOND W. FERRITTO, and ALFRED S. CALABRESE, also known as "Allie" and others as yet unknown, are associated in fact in an enterprise as defined in Title 18, United States Code, Section 1961 (4), the activities of which affect interstate commerce, to wit: a group associated in fact to control loan sharking and other criminal activities in Northern Ohio and to commit various criminal acts, including murder, threats involving murder, and conspiracy to murder and are participating directly and indirectly in the conduct of the enterprises' affairs through a pattern of racketeering activity, including threats involving aggravated murder and felonious assault, felonies punishable by imprisonment for more than one year under the Ohio Revised Code, Sections 2903.1 and 2903.11, and Mail Fraud, in violation of Title 18, United States Code, Section 1341 and are conspiring to do so, in violation of Sections 1962 (c) and (d) of Title 18, United States Code.

.....

E. MICHAEL KAHOE
Special Agent
Federal Bureau of Investigation

Sworn and Subscribed to Before me this ..... day of December, 1977.

.....

United States Magistrate

## APPENDIX L

### Indictment

(December 5, 1977)

CUYAHOGA COUNTY COMMON PLEAS

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THE STATE OF OHIO

VS.

PASQUALE CISTERNINO, JAMES FRATIANNO, ALFRED CALABRESE, RONALD CARABBIA, JAMES LICAVOLI aka JACK WHITE, JOHN CALANDRA, ANGELO LONARDO, THOMAS SINITO, RAYMOND FERRITTO

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A TRUE BILL INDICTMENT FOR AGGRAVATED ARSON R.C. 2909.02 W/CT AGGRAVATED MURDER R.C. 2903.01 WITH SPECIFICATIONS W/CT ENGAGING IN ORGANIZED CRIME R.C. 2923.04 W/CT CONSPIRE TO COMMIT AGGRAVATED ARSON R.C. 2923.01-2909.02 W/CT CONSPIRE TO COMMIT AGGRAVATED MURDER R.C. 2923.01-2903.01

| Date of Offense | The Term of | Case No. |
|---|---|---|
| October 6th, 1977 | SEPTEMBER OF 1977 | CR36324 |

THE STATE OF OHIO, CUYAHOGA COUNTY, SS.

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, IN THE NAME AND BY THE AUTHORITY OF THE STATE OF OHIO, Do find and present, that the above named Defendant(s), on or about the date of the offense set forth above, in the County of Cuyahoga, unlawfully and purposely and by means of fire or explosion, knowingly created a substantial risk of physical harm to

Daniel J. Greene, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

/s/ (Illegible)
*Foreman of the Grand Jury*

/s/ JOHN T. CORRIGAN
*Prosecuting Attorney*

CUYAHOGA COUNTY COMMON PLEAS

THE STATE OF OHIO

VS.

PASQUALE CISTERNINO, JAMES FRATIANNO, ALFRED CALABRESE, RONALD CARABBIA, JAMES LICAVOLI aka JACK WHITE, JOHN CALANDRA, ANGELO LONARDO, THOMAS SINITO, RAYMOND FERRITTO

A TRUE BILL INDICTMENT FOR AGGRAVATED MURDER R.C. 2903.01 WITH SPECIFICATIONS

| Date of Offense | The Term of | Case No. |
|---|---|---|
| October 6th, 1977 | SEPTEMBER OF 1977 | |

THE STATE OF OHIO, CUYAHOGA COUNTY, SS.

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, IN THE NAME AND BY THE AUTHORITY OF THE STATE OF OHIO, Do find and present, that the above named Defendant(s), on or about the date of the offense set forth above, in the County of Cuyahoga, unlawfully and purposely and with prior calculation and design, caused the death of another, to-wit: Daniel J. Greene and/or caused the death of another, to-wit: Daniel J.

Greene while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit Aggravated Arson.

SPECIFICATION ONE:

The Grand Jurors further find and specify that the offense presented above was committed while the offender was committing or attempting to commit or fleeing immediately after committing or attempting to commit Aggravated Arson.

SPECIFICATION TWO:

The Grand Jurors further find and specify that the offender committed the offense presented above for hire, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

/s/ (Illegible)
*Foreman of the Grand Jury*

/s/ JOHN T. CORRIGAN
*Prosecuting Attorney*

CUYAHOGA COUNTY COMMON PLEAS

THE STATE OF OHIO

VS.

PASQUALE CISTERNINO, JAMES FRATIANNO, ALFRED CALABRESE, RONALD CARABBIA, JAMES LICAVOLI aka JACK WHITE, JOHN CALANDRA, ANGELO LONARDO, THOMAS SINITO, RAYMOND FERRITTO

A TRUE BILL INDICTMENT FOR ENGAGING IN ORGANIZED CRIME R.C. 2923.04

| Date of Offense | The Term of | Case No. |
|---|---|---|
| October 6th, 1977 | SEPTEMBER OF 1977 | |

THE STATE OF OHIO, CUYAHOGA COUNTY, SS.

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, IN THE NAME AND BY THE AUTHORITY OF THE STATE OF OHIO, Do find and present, that the above named Defendant(s), on or about the date of the offense set forth above, in the County of Cuyahoga, unlawfully and purposely did, with purpose to establish or maintain a criminal syndicate or to facilitate its activities, commit, conspire or attempt to commit or act as an accomplice in the commission of an offense of violence, to-wit: Aggravated Murder and Aggravated Arson, in violation of Section 2923.04 of the Ohio Revised Code, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

/s/ (Illegible)
*Foreman of the Grand Jury*

/s/ JOHN T. CORRIGAN
*Prosecuting Attorney*

CUYAHOGA COUNTY COMMON PLEAS

THE STATE OF OHIO

VS.

PASQUALE CISTERNINO, JAMES FRATIANNO, ALFRED CALABRESE, RONALD CARABBIA, JAMES LICAVOLI aka JACK WHITE, JOHN CALANDRA, ANGELO LONARDO, THOMAS SINITO, RAYMOND FERRITTO

A TRUE BILL INDICTMENT FOR CONSPIRE TO COMMIT AGGRAVATED ARSON
R.C. 2923.01-2909.02

| Date of Offense | The Term of | Case No. |
|---|---|---|
| October 6th, 1977 | SEPTEMBER OF 1977 | |

THE STATE OF OHIO, CUYAHOGA COUNTY, SS.

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, IN THE NAME AND BY THE AUTHORITY OF THE STATE OF OHIO, Do find and present, that the above named Defendant(s), on or about the date of the offense set forth above, in the County of Cuyahoga, unlawfully and purposely did, with purpose to commit, promote or facilitate the commission of Aggravated Arson, with each other plan or aid in planning the commission of such offense and/or agree with each other that one or more of them would engage in conduct which facilitates the commission of such offense, in violation of Section 2923.01 of the Ohio Revised Code, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

/s/ (Illegible)
*Foreman of the Grand Jury*

/s/ JOHN T. CORRIGAN
*Prosecuting Attorney*

CUYAHOGA COUNTY COMMON PLEAS

THE STATE OF OHIO

VS.

PASQUALE CISTERNINO, JAMES FRATIANNO, ALFRED CALABRESE, RONALD CARABBIA, JAMES LICAVOLI aka JACK WHITE, JOHN CALANDRA, ANGELO LONARDO, THOMAS SINITO, RAYMOND FERRITTO

A TRUE BILL INDICTMENT FOR CONSPIRE TO COMMIT AGGRAVATED MURDER
R.C. 2923.01-2903.01

| Date of Offense | The Term of | Case No. |
|---|---|---|
| October 6th, 1977 | SEPTEMBER OF 1977 | |

THE STATE OF OHIO, CUYAHOGA COUNTY, SS.

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, IN THE NAME AND BY THE AUTHORITY OF THE STATE OF OHIO, Do find and present, that the above named Defendant(s), on or about the date of the offense set forth above, in the County of Cuyahoga, unlawfully and purposely did, with purpose to commit, promote or facilitate the commission of Aggravated Murder, with each other plan or aid in planning the commission of such offense, and/or agree with each other that one or more of them would engage in conduct which facilitates the commission of such offense, in violation of Section 2923.01 of the Ohio Revised Code, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

/s/ (Illegible)
*Foreman of the Grand Jury*

/s/ JOHN T. CORRIGAN
*Prosecuting Attorney*

## APPENDIX M

### Constitutional and Statutory Provisions Which the Case Involves

**United States Constitution:**

*Amendment IV*:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

*Amendment V*:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

*Amendment XIV*:

"* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

**Ohio Revised Code:**

§*2903.01 Aggravated Murder*:

"(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape."

§*2909.02 Aggravated Arson*:

"(A) No person, by means of fire or explosion, shall knowingly:

(1) Create a substantial risk of serious physical harm to any person;

(2) Cause physical harm to any occupied structure;

(B) Whoever violates this section is guilty of aggravated arson, a felony of the first degree."

No. 80-1397

MAR 16 1

# In the Supreme Court of the United States

**October Term, 1980**

RONALD CARABBIA,
and
PASQUALE CISTERNINO,
*Petitioners,*

vs.

THE STATE OF OHIO,
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE EIGHTH DISTRICT COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## COUNTER QUESTIONS OF LAW

1. Where the facts show that an eyewitness identification was not influenced by a pre-trial photo array identification, the defendant's right to a fair trial is not prejudiced by the testimony of the eyewitness.

2. The trial court may properly restrict irrelevant and immaterial cross-examination where the subject matter of the cross-examination is not pertinent to the trial issues or to the protection of a defendant's constitutional rights.

3. Where a defendant fails to establish standing to object to a search, a trial court is legally justified in denying the defendant a hearing on a Motion to Suppress.

4. Where a defendant fails to establish a right to privacy in the area searched, he lacks standing to object to the search and has no right to challenge the legality of the search as it relates to him.

5. A prosecutor's closing argument should be considered in light of the nature of the case, the facts presented during trial, and the strength of the State's case.

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To: The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

## OBJECTIONS TO JURISDICTION

There is no substantial federal question involved which would require this Court to review this case.

The question herein presented was raised in the Court of Appeals of Cuyahoga County, Ohio, and the Supreme Court of Ohio. The Court of Appeals affirmed the convictions. The Supreme Court of Ohio overruled the defendants' Memorandum in Support of Jurisdiction, and affirmed the convictions.

The Ohio Courts decided this case in accordance with statutes of the State of Ohio, the Constitution of the United States, and the applicable decisions of this Court. No substantial federal question is therefore presented by the petition for certiorari.

## HISTORY OF THE CASE

On December 5, 1977 the defendants were indicted for the aggravated murder of Daniel Greene. The jury selection for trial began on February 21, 1978; the presentation of evidence began on March 29, 1978. On May 25, 1978, both defendants were found guilty of aggravated murder and aggravated arson.

Both defendants appealed their convictions to the Court of Appeals for the Eighth District. On July 10, 1980 the Court of Appeals upheld the convictions of both the defendants.

Subsequently, both defendants filed a Memorandum in Support of Jurisdiction with the Ohio Supreme Court. The Ohio Supreme Court denied each defendant's Memorandum in Support of Jurisdiction.

Now, both defendants file this Petition for Writ of Certiorari.

## STATEMENT OF FACTS

For over two years before he was murdered, people involved in organized crime in the Cleveland area had been trying to kill Daniel Greene. Until October 6, 1977, the closest they had come to killing Greene was when they bombed his home on Waterloo Road on May 12, 1975 at which time Greene sustained minor injuries.

Due to the failure of the Cleveland organization to kill Greene, outside help was sought. Between May and July of 1976, Raymond Ferritto received a phone call from James Fratianno. Fratianno told Ferritto he wanted to meet with him in Warren, Ohio. The day after the phone call Ferritto and Fratianno met at the Town and Country Motel in Warren. Fratianno explained to Ferritto that there were some problems in Cleveland; that someone was trying to muscle in on the Cleveland operations; and that Ferritto should talk to Tony Del Santer because Del Santer might have some work (killing) for him.

A couple of weeks after that meeting, Ferritto received another phone call from Fratianno. On the following day, Ferritto met with Fratianno and Del Santer at Cherry's dinner club in Warren; at that meeting Ferritto was introduced to Tony Del Santer by Fratianno. Fratianno then left the two of them alone.

Del Santer explained to Ferritto that Cleveland was having trouble with John Nardi and Greene because the two of them were trying to muscle in on Cleveland's gambling operations, and that they had to be taken care of. Ferritto said he was interested and wanted to know what was in it for him. Del Santer said he would check with Jack White (Licavoli). (This meeting with Del Santer occurred in July or August of 1976).

Two to three weeks after the meeting with Del Santer, Ferritto received a phone call from defendant Ronald Carabbia. Carabbia told Ferritto to meet with him at Cherry's in Warren, Ohio.

It was either on the same night of the Carabbia call or the following night Ferritto went to Warren and met with Carabbia, Licavoli, Del Santer and defendant Cisternino. At that meeting, Ferritto was told that in exchange for killing either or both Greene and Nardi he would

receive either money or he would be made a member of the organized crime syndicate commonly referred to as the Cosa Nostra.

Ferritto agreed to take the work and was told that when the groundwork was laid for the killings, he would be contacted. Cisternino was supposed to take care of all the preparations for the killings, to include recording the habits and schedules of the intended victims.

In November, 1976, Ferritto called Carabbia and asked him about the status of the Greene and Nardi contracts. Carabbia said he hadn't heard from Cleveland.

The next time Ferritto discussed the matters of the killing contracts was in April of 1977.

Ferritto called Carabbia in April of 1977 to find out if the deal to kill Greene and Nardi was still good. Ferritto had read where there were previous attempts on Nardi's life and thought the deal was off.

In April of 1977 Ferritto met with Del Santer, Carabbia, Cisternino and John Calandra at either Cherry's or the Living Room (also a supper club). John Calandra was representing Licavoli. Ferritto was told the deal to kill Greene and Nardi was still good, but that the schedules of Greene and Nardi were erratic. They also discussed Ferritto's payment.

Thereafter Ferritto made a few trips to Cleveland and received some license numbers of Greene's cars from Cisternino. Cisternino also showed Ferritto where Greene was living, where he ate (Kenny King's), and Greene's trailer on Waterloo Road. (That was Greene's office because the building he lived in was destroyed by the bombing in 1975.)

During the summer of 1977 Ferritto made many trips to Cleveland to meet with Cisternino on the deal to kill

Greene and Nardi. Between May and August, 1977, Ferritto made ten to twelve trips to Cleveland.

When Ferritto came to the Cleveland area he stayed at either the Sheraton Inn, Holiday Inn, or Ramada Inn on Euclid Avenue, and once stayed at the Holiday Inn Downtown. All of this was substantiated by receipts from the various inns and by a motel key found at 919 Rondel.

In May of 1977, John Nardi was murdered in the same fashion as Greene was to be murdered. After the murder of Nardi, Cisternino and Allie Calabrese drove to Erie, Pennsylvania (where Ferritto lived) and gave Ferritto a blue Plymouth. At that time, Cisternino told Ferritto of an unsuccessful attempt they had made on Nardi and Greene's life; the bomb was planted on Nardi's car but they forgot to set the arming switch, so the bomb did not go off when the remote control switch was thrown. Cisternino also told Ferritto of other unsuccessful attempts on Nardi's life where Cisternino fired at Nardi at point blank range with a shotgun and missed; also, Cisternino, Calabrese and another person fired at Nardi with a rifle and missed.

At that meeting with Cisternino and Calabrese, Ferritto was given the necessary papers to transfer the Plymouth.

By using Marybeth Mitchell, Larry Fabrizi, Frank Thomas, and a high school kid, Ferritto transferred the title of the Plymouth to the fictitious name of Guy Mitchell, and had the new Pennsylvania plates put on the car. (This was to be the get-away car used by Carabbia and Ferritto after they killed Greene.)

Thereafter Ferritto started coming to Cleveland in an attempt to locate and kill Greene.

It was during these trips to Cleveland that Ferritto began in earnest to stalk and kill Greene. His main contact in Cleveland was Cisternino.

In August of 1977, Ferritto met with Del Santer and Licavoli at the Living Room in Warren. He told them of the problems he was having with Cisternino. Cisternino was not providing Ferritto with the proper assistance. One week after this meeting, Del Santer died (a natural death).

After attending Del Santer's wake (Ferritto, Fratianno, Licavoli, Calandra and Cisternino all attended the wake), Ferritto discussed the killing of Greene with Fratianno, Licavoli and Calandra at Sabatino's Restaurant in Warren. Licavoli told Ferritto that if he needed anything Calandra would get it for him. Ferritto said he needed money for expenses and Licavoli said he would see that he gets some. Ferritto was also told that after Greene was killed, Ferritto would be taken to Detroit and made a member of the organization and that he would get 25% of the gambling take from Youngstown and Warren. Ferritto was also told that they were getting ready to put a wire tap on Greene's phone and that they should be getting tapes from that wire tap soon.

A few days after the Del Santer funeral, Carabbia met with Ferritto and gave him $5,000 for expenses.

Toward the end of August, 1977, Ferritto went to Cleveland and met with Cisternino at the motel in which Ferritto was staying. Cisternino gave him two tape cassettes that were recorded from the wire tap on Greene's phone. Ferritto went to an Uncle Bill's store and bought a cassette tape recorder to play the bugging tapes. (This is substantiated by Murial Robinson, the salesgirl (Vol. 12, R. 4611-45), and the cash register tape of the sale.) Ferritto described the salesgirl and location of the Uncle

Bill's store where he bought the recorder. When Ferritto tried to play the tapes, they sounded garbled. Cisternino said he would take the recorder back to Marconi to see if he could correct the problem. (The search of Marconi's house revealed a tape cassette recorder box exactly like the one purchased by Ferritto. The recorder used by Ferritto has never been recovered; Ferritto doesn't know what happened to the recorder.) Ferritto went back to Erie, Pennsylvania.

About one week later, Ferritto went back to Cleveland and met with Cisternino. Cisternino had some more tapes. (The tapes would go from Thomas Sinito to Angelo Lonardo to Cisternino or Ferritto.)

A few days after the meeting with Licavoli at the Del Santer funeral, Ferritto met with Carabbia and Carabbia gave Ferritto $5,000—the expense money promised by Licavoli.

Ferritto met with Cisternino in Cleveland numerous times for the purpose of killing Greene. Beside meeting Cisternino at the various motels at which he would stay, Ferritto also met with Cisternino at a house on Kipling Avenue on Cleveland's east side, Cisternino's hideout.

A search of this house later revealed the fingerprints of Cisternino, Calabrese, and Joseph Bonnarigo on various documents; numerous F.B.I. and local police department radio frequencies written by Carmen Marconi; and a motel key bearing the room number of a room at which Ferritto stayed during one of his visits.

During September, 1977, Ferritto and Cisternino planned to kill Greene by using a device that can best be described as a bomb box. A steel box with one side open and four railroad spikes as legs was fabricated. Ferritto and Cisternino drove to Greene's apartment house and

planted the metal box near the front door. Near the box a plastic bottle filled with nails and a flammable liquid was placed. Their original intention was to put a bomb in the metal box and place the bottle of nails and liquid in front of the bomb. The bomb box would then be placed so that the opening of the box would face the vicinity of the front door to the apartments. When Greene would come within range of the bomb box, the bomb would be detonated blasting the nails and flammable liquid at Greene. The idea was abandoned because there were too many old people in the building that might have been injured. (Cisternino had brought a bomb in a shopping bag but they decided not to use it.) The bomb box was found and later turned over to the Cleveland Police Department. Ferritto went back to Erie, Pennsylvania the next day.

The following week (the first Monday in October) Carabbia called Ferritto and told him something had come up and that they should meet in Struthers, Ohio. On Tuesday, Ferritto went to Struthers and met with Carabbia. The two of them drove to Mosquito Lake, outside of Warren, Ohio. Once at Mosquito Lake, Carabbia and Ferritto met with John Calandra, Licavoli, Cisternino and Angelo Lonardo. They all went to a boat to discuss the killing of Greene. A tape was played that revealed a dental appointment made for Greene by his girl friend; the appointment was made for Thursday at 2:30 p.m. It was decided that they would try to kill Greene Thursday at 2:30 p.m. (October 6, 1977).

(Previously, Anthony Liberatore hired two men to assist in the killing of Greene—Louis Aratari and Ron Guiles.)

Ferritto went back to Erie, packed some overnight articles and went to Cleveland on Wednesday. Ferritto

met Cisternino at the parking lot of a Holiday Inn and the two of them proceeded to Apt. 333 in the Winchester Hills Apartment Building; they arrived at about 12:30 p.m. Cisternino had a key to the apartment. The apartment belonged to Cisternino's friend—Zolton Kalman. (Kalman fled the area and still is in hiding.) About an hour later, Carabbia arrived at the apartment. Ferritto and Carabbia stayed there overnight; Cisternino left that evening.

Thursday morning Cisternino arrived and brought with him a police radio scanner (monitor): he also brought the components of the bomb that would later be used to kill Greene. With Ferritto assisting him, Cisternino assembled the bomb. (Ferritto earlier purchased some black electrical tape at a Gold Circle store. A later search of Apt. 333 revealed a Gold Circle purchase label in an ashtray. The search also revealed a Tennelec scanner manual containing the prints of Cisternino, Calabrese and Marconi.)

Between 1:00 and 1:30 p.m. on Thursday, October 6, 1977, Raymond Ferritto and Ronald Carabbia left Apt. 333 to go to Brainard Place to kill Greene. Cisternino stayed at the apartment to listen to the radio scanner for the purpose of monitoring police and F.B.I. reactions to the bombing.

Ferritto drove a blue Plymouth (the car Cisternino and Calabrese had brought him months before, and the car he drove from Erie to Cleveland) and Carabbia drove a Chevrolet Nova (the bomb car Cisternino provided); Ferritto followed Carabbia to Brainard Place, a small plaza in Lyndhurst, Ohio; they arrived at about 2:00 p.m. Both cars were parked in the lot and they waited for Greene to arrive. They had waited about 10 minutes when they met with Aratari and Guiles (two other men hired by Anthony Liberatore to kill Greene). All four men talked about how they would try to kill Greene. Aratari and Guiles were

going to try and shoot him; if that didn't work, the bomb would be used.

Later Greene arrived in a brown Lincoln and went into the Medical Building. Ferritto waited until the parking space next to Greene's car became vacant and then he parked the Nova (bomb car) next to Greene's car so that the passenger door of the Nova was next to the driver's side of Greene's car. Ferritto then got the bomb and placed it in a metal box fastened to the inside of the passenger door of the Nova. The bomb was to be detonated by a remote control device.

Ferritto and Carabbia then got into the blue Plymouth and drove to a phone booth at the corner of Brainard and Cedar Roads to wait for Greene to get into his car.

Greene came out of the Medical Building and was walking to his car. Ferritto and Carabbia got into the blue Plymouth and started to turn right onto the ramp leading to the freeway. At that same time, Debbie and Gregory Spoth were attempting to turn left onto the same ramp; Debbie Spoth was driving. Debbie Spoth hesitated for a few seconds because Ferritto was not turning as he should have and Debbie did not know whether to wait for him to turn or to pull in front of him. (Both Spoths later identified Ferritto as the driver of the blue Plymouth.)

Eventually Debbie Spoth turned in front of Ferritto. As the Spoth car and Ferritto car were slowly driving towards the ramp to the freeway, Greene reached his car, and Carabbia, using a remote control device, detonated the bomb and killed Greene.

Ferritto then pulled his car around the left side of the Spoth car. Debbie Spoth looked at the Ferritto car and saw Carabbia in the back seat looking back at her in the direction of the explosion. Debbie Spoth later identified Carabbia as the man in the rear of the blue Plymouth.

Ferritto and Carabbia returned to Apt. 333. Ferritto returned to Erie; Carabbia went back to Youngstown, and Cisternino was last seen at the apartment.

About ten days later on a Saturday, Ferritto met with Cisternino and Licavoli at Sabatino's Restaurant in Warren, Ohio where they discussed the killing of Greene and Ferritto's compensation.

About a week later (due to the information received from the Spoths), F.B.I. agents, Cleveland police and Lyndhurst police searched Ferritto's home in Erie. After the search of Ferritto's home, Ferritto contacted Carabbia and said he would need money for an attorney. A few days later, Ferritto met with Carabbia and received $5,000. In the meantime, Ferritto had the blue Plymouth repainted brown.

Ferritto was eventually arrested and charged with the murder of Greene. He turned State's evidence and agreed to testify in exchange for a reduced sentence. Aratari was also arrested and agreed to testify in exchange for a reduced sentence.

Both Ferritto and Aratari testified at trial as to Cisternino's and Carabbia's involvement in the murder of Daniel Greene. Cisternino and Carabbia were convicted.

## REASONS FOR DENYING THE WRIT

### 1. WHERE THE FACTS SHOW THAT AN EYEWITNESS IDENTIFICATION WAS NOT INFLUENCED BY A PRE-TRIAL PHOTO ARRAY IDENTIFICATION, THE DEFENDANT'S RIGHT TO A FAIR TRIAL IS NOT PREJUDICED BY THE TESTIMONY OF THE EYEWITNESSES.

The Ohio Court of Appeals properly recognized that the pre-trial photo array identification procedure used by the State was not suggestive and that there was no error in permitting Debbie Spoth to testify.

It should be noted at the outset that Ferritto testified that Carabbia was in the back seat of the car when Greene was murdered. Aratari testified that Carabbia was in the blue Plymouth with Ferritto, and Debbie Spoth testified Carabbia was in the back seat.

The relevant facts in the record are found at (R. 3256-3714, Volumes 9 and 10).

On October 6, 1977, at about 3:00 p.m., Daniel Greene was murdered by a bomb explosion in a car parked next to his. At that time, Debbie and Gregory Spoth were at the intersection of Brainard and Cedar Roads. Both Spoths saw Raymond Ferritto driving the blue Plymouth used as the get-away car, and Debbie Spoth saw Carabbia in the rear seat of the same car. Debbie Spoth looked right at Carabbia's face (R. 3411, Volume 9) as Ferritto pulled out from behind and around the Spoth car. In the courtroom, Debbie Spoth positively identified Carabbia as being in the back seat of the blue Plymouth (R. 3436).

Shortly after Ferritto drove past the Spoth car, the Spoths caught up with the blue Plymouth and recorded the

description of the car, its license number, and saw Ferritto driving again, but did not see Carabbia.

At about 3:45 p.m., October 6, 1977, Debbie Spoth called her father, a Berea police officer, to tell him what they saw (R. 3417). A series of phone calls followed between the Spoths and Officer Arthur Volpe (Debbie Spoth's father), and between Volpe and the Berea Police Department (to check out the license plate listing of the 1973 Plymouth). About 11:30 that night, Volpe contacted Lt. Andrew Vanyo of the Cleveland Police Intelligence Unit to give him some of the information that the Spoths had related to Volpe. Volpe refused to disclose the source of the information or the identities of the Spoths.

Thereafter, questions and photographs were passed back and forth by Lt. Vanyo and Lt. Joseph Wegas of the Lyndhurst Police Department to Volpe, who, in turn, relayed the questions and photos to the Spoths.

Photographs were sent by Lt. Vanyo on October 7 (and viewed by the Spoths on October 9); October 22 (and viewed by the Spoths on October 23); November 2 (and viewed by the Spoths on November 4); and December 2 (and viewed by the Spoths on December 4) (R. 3085-90). Out of the October 7th set of photos, the Spoths identified two photos of Ferritto—neither of which accurately portrayed Ferritto as the Spoths saw him. The Spoths then drew a sketch of Ferritto as they saw him, and a diagram of the intersection of Brainard and Cedar Roads (R. 3425-27). The diagram, sketch, and a questionnaire were eventually sent by the Spoths to the State via Volpe, Wegas, and Vanyo. (The sketch of Ferritto is St. Ex. 110; the diagram of the area is St. Ex. 111; the car description and license number is St. Ex. 112; and the envelope and questionnaire are St. Exs. 107 and 108.)

On the order of the county prosecutors, no law enforcement agency was to attempt to discover the identity of the then secret witnesses. Volpe had stated that the witnesses were not certain they were going to testify; the prosecutors did not want to attempt to put them under additional pressure so early in the case.

In February, 1978, the prosecutors learned that the witnesses were willing to meet openly with them and the police, and were willing to testify.

On the evening of February 16, 1978, Prosecutors Walsh and Marino, along with Lyndhurst and Cleveland detectives, met with the Spoths at Volpe's home in Berea for the first time.

At Volpe's home, in the dining room, Prosecutor Marino showed each witness separately a nine photograph array of the defendants, including Ferritto, Fratianno, and Calandra (R. 3392). Each witness readily identified Ferritto as being the driver; Licavoli from the newspapers; Cisternino from the newspapers, and that Ferritto claimed he was in the car with Cisternino (which both Spoths said was not so); and Carabbia (Debbie Spoth said Carabbia's picture looked like the man in the rear of the car, but she would have to see him in person to be sure (R. 3276)); Gregory Spoth was never sure of his ability to identify the man in the rear seat (R. 3383 and 3384).

That was the only meeting between law enforcement personnel and the Spoths until they met again with the prosecutors April 10, 1978, two days before they testified (R. 3453). On April 12th and 13th, the Spoths testified in court.

On April 12th the court granted a defense motion to voir dire both Spoths. Debbie Spoth related the circumstances of how she saw Ferritto and Carabbia, and identified

Carabbia in court as the man in the rear seat. Gregory Spoth related what he saw and identified Attorney Ralph Sperli as resembling the person he saw in the back seat (R. 3379). Gregory Spoth testified that from the photos he viewed on February 16, 1978, Carabbia's photo most resembled the man in the rear seat (R. 3382-85).

At the time Gregory Spoth picked Sperli as resembling the man in the rear seat, he was under considerable pressure. The courtroom was filled with spectators and news personnel; there were six defendants and ten defense attorneys at the trial table; and the court, much to the concern of the Spoths and the State, forced the Spoths to give their home address (R. 3287-89).

Overall, the facts show that Gregory Spoth was never able to positively identify Carabbia as being in the rear seat of the car.

It must be remembered that at the time the Spoths were shown the photographs by Prosecutor Marino (St. Ex. 109A-I) on February 16th, the State, F.B.I., A.T.F., Lyndhurst Police and Cleveland Police were fully convinced that Cisternino was in the rear seat of the car driven by Ferritto. The State had no idea that anyone other than Cisternino was in the rear seat. So, it came as quite a surprise that the Spoths tentatively identified Carabbia as being in the rear seat, and that they refuted Ferritto's contention that Cisternino was in the rear seat.

Louis Aratari was not apprehended until February 28, 1978 (R. 6221, Vol. 17). The State never even heard of Louis Aratari until he was arrested. Ferritto had given a sketchy description of two men hired by Anthony Liberatore to support Ferritto and Carabbia, but he did not remember their full names or addresses. The F.B.I. was in the process of investigating everything Ferritto told them, including the identity of the two support men.

When Aratari was arrested on February 28, 1978, it was then that the State discovered that Ferritto had lied about Cisternino being in the back seat. Aratari confessed, and stated that Carabbia was with Ferritto and him at Brainard Place when Greene was killed; and that he last saw Carabbia in the passenger seat of the blue Plymouth (R. 6182-6206, Vol. 16). (Aratari was not on the scene when Greene was killed. He left shortly before the explosion, and returned shortly after the explosion.)

The allegation that the procedure used to show the February 16th photographs to the witnesses was "outrageously suggestive" is in utter disregard of the facts. Debbie Spoth identified Carabbia at trial and Gregory Spoth did not. In light of that fact alone, how could the procedure possibly be deemed suggestive? Furthermore, on February 16th the prosecutors and all law enforcement officers connected with the case believed that Cisternino was in the rear seat. How could the procedure be suggestive if no one knew or even suspected Carabbia of being with Ferritto? That the procedure was proper and objective is shown by the fact that both Spoths knew Ferritto had publicly identified Cisternino as being in the car with him, and yet they tentatively identified Carabbia as the man in the rear seat knowing they were going against the statement of Ferritto; further, they positively excluded Cisternino as being in the car because he was much too young (R. 3281, 3382-84, Vol. 9).

The defendants complain that the court erred in refusing to order Prosecutor Marino to take the witness stand for voir dire. The record shows that all counsel for Mr. Carabbia wanted was a statement from Prosecutor Marino and that statement was made on the record (R. 3391-92, Vol. 9). Further, it is highly improper to involve counsel in a case as a witness because there is a danger

that it will appear to the jury that counsel had a personal interest in the case.

As for the issues concerning Debbie Spoth's "opportunity to observe", "length of time between crime and identification", "degree of attention", "accuracy of prior description", and "level of certainty", these are all matters of fact for the jury to decide. The trial court has no right or jurisdiction to decide matters of facts. In this case, the court properly decided that Debbie Spoth's testimony in full should be heard and considered by the jury.

The State notified the defendants as to the Ferritto lie as soon as possible; and that was after Louis Aratari was arrested on February 28, 1978. The State notified the court and defendants of Aratari's statement and the change in the State's case on the morning of March 3, 1978 (R. 965-999, Vol. 3). (See in particular Prosecutor Marino's statement to the court (R. 969-71, and 982-85).) After Aratari was arrested and confessed, Ferritto was confronted with Aratari's statement and he admitted the lie. The reason Prosecutor Marino could not state his reasons for suspecting that Carabbia was in the rear seat was because there was no substantive basis for believing that Ferritto lied. The only conflict at that time was the Spoths' tentative identification of Carabbia's photo. Only when Aratari was arrested was the State able to prove Ferritto lied by the use of Aratari's statement and Ferritto's admission that he lied.

The State was not about to reveal the identity or whereabouts, or even confirm the existence of the two secret witnesses—the Spoths. The prosecutors felt that every possible precaution should be taken not to jeopardize the witnesses or put any unnecessary pressure on them by way of public and media attention. Until they testified, no one—especially the defendants—knew for sure

whether there were actually any independent eyewitnesses or whether the State was bluffing.

Under the factual situation of this case, no law would ever require that a defendant or his representative be allowed to be present when such witnesses view a photo array as the Spoths did on February 16th. The importance of protecting innocent citizens who are eyewitnesses to a bombing murder perpetrated by the likes of the defendants, far outweighs any defendant's right to be represented at such a pre-trial proceeding. The defendants can cite no law that allows them such a right under these circumstances. By all the bounds of propriety, common sense, law, and morality, the first and foremost consideration of the law enforcement community is the protection of the innocent.

The defendants had plenty of time to adjust to the new evidence. The State gave them discovery of the new evidence on March 3, 1978; witness testimony began March 31, 1978.

These defendants had no right to be represented at such a pre-trial proceeding as occurred on February 16th under the circumstances of this case. This was the first time representatives of the law enforcement community were meeting with the witnesses; they were very apprehensive about testifying; and were extremely sensitive about their identity being disclosed. Under these circumstances, no prosecutor would ever permit any representative of defendants of this ilk to discover the identity of secret witnesses. Such misplaced trust in any agent of these defendants would only result in danger to the witnesses.

The accuracy of Debbie Spoth's identification and her ability to make such an identification, compared to Gregory Spoth's inability to identify Carabbia are all matters of

fact for the jury to consider. It would be contrary to our system of jurisprudence for the court to prevent the jury from considering such facts. In point of fact, Debbie Spoth was in a better position to see Carabbia than was Gregory Spoth. When Ferritto drove his car around and past the left side of the Spoth car, Carabbia was in the right rear seat looking back at Debbie Spoth, who was in the front left seat, driving. She was closer to Carabbia than was Gregory.

A review of the court's jury charge shows that the jury was properly charged on all material issues including eyewitness identification (R. 9772-9830, Vol. 26, in particular R. 9784). No special instruction was necessary because there never was any mistaken identification; there was only an inability to identify on the part of Gregory Spoth.

Further, the record shows, contrary to the court's instructions, that Attorney Ralph Sperli did tell the jury by his cross-examination that Gregory Spoth identified him (R. 3585, Vol. 9). This was a deliberate attempt to mislead the jury. Gregory Spoth identified Sperli as resembling the man in the back seat, and not as the man in the back seat (R. 3379, Vol. 9).

Throughout his voir dire and testimony to the jury, Gregory Spoth continually stated he could not identify the man in the back seat, but that a number of people in the courtroom resembled the man in the back seat (R. 3567).

There was no unreasonable restriction on defense cross-examination. The defense was allowed to show that Gregory Spoth thought others in the courtroom resembled the man in the back seat, and that Gregory Spoth could not identify anyone as being in the back seat.

A review of the record will show that the defendants' complaints are not well-founded. The court only precluded questions that were irrelevant, speculative, or not probative of issues involved.

The defendants' right to cross-examine their accusers was fully protected; there was no violation of their constitutional rights.

The cases cited by the defendants are not factually similar to this case. Here, there was no mistaken identification; there was only a tentative photo identification, and an inability to make a positive in-court identification.

## 2. THE TRIAL COURT MAY PROPERLY RESTRICT IRRELEVANT AND IMMATERIAL CROSS-EXAMINATION WHERE THE SUBJECT MATTER OF THE CROSS-EXAMINATION IS NOT PERTINENT TO THE TRIAL ISSUES OR TO THE PROTECTION OF A DEFENDANT'S CONSTITUTIONAL RIGHTS.

A revew of the record in toto reveals that the Sixth Amendment rights of the defendants were well protected. Considerable latitude was allowed the defendants in their cross-examination of State's witnesses.

The allegations made by the defendants in this issue are not supported by the overall record, or specifically, by their page cites.

The court properly ruled that Greene's relationship with the F.B.I. was totally irrelevant. The defense attempted to create an air of speculation without ever producing one piece of credible evidence that someone other than the defendants had killed Greene. Their attempts at involving others in the murder of Greene were intended to mislead the jury, and to focus attention on

someone other than themselves without ever providing any viable evidence that others were involved. To merely allege that "other individuals" might have a "more likely motive" to kill Greene than the defendants had, certainly is not sufficient reason or basis to allow rambling cross-examination. The defendants never presented any evidence that would support their alleged right to cross-examine State witnesses in those areas they were precluded.

Fratianno was never properly subpoenaed by the defendants. Frank Dovishaw was in no way connected with this murder—he merely helped Ferritto operate numbers and gambling. A review of Ferritto's testimony shows that Dovishaw never participated or assisted in the conspiracy to murder Greene; he was totally ignorant of Ferritto's involvement in Greene's murder until the F.B.I. contacted him to assist them in tracing the car, plates and ignition key.

Dovishaw made no witness statement. Other than helping the F.B.I. trace the get-away car, Dovishaw's knowledge of this crime is nil. Finally, the defense never properly subpoenaed Dovishaw to testify.

Debbie Spoth's knowledge of this incident is obviously limited to what she saw at the scene and her later dealings with the law enforcement community. She knew nothing of Liberatore and Lanci, and the court properly curtailed such cross-examination, if such questioning was pursued by the defense. (The defendants' page cite of (R. 2090-96) on page 65 of their brief must be in error. Whatever their intention is on making that cite, it definitely is not relevant to Debbie Spoth's testimony; those pages are the direct examination of Ronald R. Thomas.)

The defendants allege that two separate groups were involved in Greene's murder. The fact is the State tried

(in two separate trials) the following individuals as co-conspirators in Greene's murder; Licavoli, Lonardo, Sinito, Lanci, Liberatore, Calandra, Cisternino, Calabreeze, and Carabbia. (As stated in the State's opening statement (R. 1121-23).) All these men acted in concert in murdering Greene; they were all of one mind and organization. Again, it is the nature of a conspiracy that some participants perform some acts in furtherance of the conspiracy, and some participants perform other acts; and all are liable even if they don't precisely know who the other participants are, or what acts they are performing (Ohio Revised Code, Section 2923.01(C)).

The search of Fulton Fish Market was not relative to this case, and examination in that area was properly precluded.

The complaints of the defendants in this issue, are, by the record, unsupported by fact. Their attempts at cross-examining State witnesses on irrelevant or speculative matters was properly curtailed by the trial court.

The Ohio Court of Appeals properly upheld the trial court's ruling, noting that the defendants had failed to establish the relevancy of the attempted cross-examination.

### 3. WHERE A DEFENDANT FAILS TO ESTABLISH STANDING TO OBJECT TO A SEARCH, A TRIAL COURT IS LEGALLY JUSTIFIED IN DENYING THE DEFENDANT A HEARING ON A MOTION TO SUPPRESS.

The record shows that the defendants never established, or proffered any evidence that would tend to establish, that they had a right to object to the complained of searches. If the defendants had no right to privacy in the areas searched, then none of their constitutionally

protected rights to privacy were violated by the searches, and the evidence was properly admitted.

The facts of this case show that Raymond Ferritto's statement to the F.B.I., part of which was used as a basis for securing search warrants, contained one deliberate lie by Ferritto unknown to anyone but Ferritto. The lie concerned the active participation of both defendants in the murder of Greene. Ferritto first said that Cisternino was in the car with him when Greene was murdered, and that Carabbia was at Apt. 333, Winchester Hills Apartments, monitoring a radio for police calls. The truth was that Carabbia was with Ferritto when Greene was murdered, and Cisternino was at the apartment.

No one (except the defendants) knew Ferritto had lied on that one point. The first indication the State had that Ferritto was lying on that point, was when the prosecutors and police met with Debbie and Gregory Spoth for the first time, at Arthur Volpe's house, on the evening of February 16, 1978 (R. 3276, Vol. 9). At that time, Prosecutor Carmen Marino showed each witness a nine-photograph array that included all the defendants (St. Ex. 109-A-I). (R. 3277, Vol. 9). Each witness was shown the array separately and out of the view of the other. Debbie Spoth recognized the following photographs: St. Ex. 109-A, Licavoli (she saw his photo in the papers); St. Ex. 109-I, Ferritto (she saw him driving the get-away car); St. Ex. 109-G, Cisternino (she saw his photo in the papers or on television and knew he was called Butchie); and St. Ex. 109-H, Carabbia (the man in the back seat of the blue Plymouth) (R. 3452-53, Vol. 9). Gregory Spoth was not able to identify Carabbia as being the man in the back seat.

At that meeting on February 16, 1978, the State first started to question that part of Ferritto's statement con-

cerning the specific participation of Cisternino and Carabbia at the time of the killing. Until that time there was no indication that Cisternino and Carabbia were other than where Ferritto had placed them.

Meanwhile, Ferritto was continually being debriefed by the F.B.I. He related that a back-up team of killers (Ronaldo Giuliani and Louis Aratari) were hired to kill Greene if Ferritto and Carabbia could not. Ferritto described both Aratari and Giuliani. The F.B.I. was in the process of getting arrest warrants for Aratari and Giuliani.

On February 28, 1978 Louis Aratari was arrested by the Middleburg Heights Police Department on a related matter and subsequently turned over to the F.B.I. Louis Aratari confessed that he and Giuliani were hired to kill Greene, that Ferritto drove the blue Plymouth, that Carabbia was in the passenger seat when he last saw them at the scene of the bombing; and that Cisternino was not at the scene of the bombing.

When confronted with Aratari's statement, Ferritto admitted he had lied about the positions of Carabbia (who was a close friend) and Cisternino, because he felt Cisternino's incompetence had led to his arrest.

First, and most importantly, neither Carabbia nor Cisternino had their Fourth Amendment rights violated because all the evidence gotten by the search warrants were from locations and residences owned and occupied by persons other than the defendants. The defendants have no standing to object to the searches or the admission of the evidence because their rights to privacy were not infringed on. Therefore, these defendants never had any right or standing to request a hearing on the search warrants. The defendants never presented a factual basis for claiming their Fourth Amendment right to privacy

had been violated. Before the search warrants could be challenged, it was incumbent upon the defendants to show that the search infringed on their right to privacy. This was not done by the defendants because it could not be done. The searches were not conducted on any premises owned or leased by the defendants. Neither defendant ever showed a factual basis for claiming a right to privacy in the residences searched.

The facts show that there was no deliberate or reckless use of false information by any law enforcement organization. As soon as Aratari was apprehended and confessed, the State made known to the court and defense the matter concerning Ferritto's lie. The F.B.I. and Agent Kahoe never had any idea that Ferritto lied about the locations of Cisternino and Carabbia on the day of the killing. Ferritto's statement had been so completely substantiated and corroborated that the F.B.I. and Agent Kahoe had no reason to doubt him. Ferritto had always said that both defendants were co-conspirators.

Ferritto's statement, only part of which was used as the basis of the search warrants, is the statement of a co-conspirator and complicitor, not merely the statement of an informant. As such, there is more reliability to be placed on a co-conspirator's statement because of his ability to know the facts he is relating; his relationship with the other defendants; his participation in the crimes charged against the defendants; the disclosure of his identity; and the fact that all defendants knew he would confront them and that they would have an opportunity to challenge his credibility in court.

In *Franks v. Delaware*, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), the facts showed that an affidavit supporting a search warrant contained two possible constitutional violations: 1—the defendant's statement uttered by him to

a youth officer before he was given his Fifth Amendment warnings; and 2—affirmations that the affiant had talked to two people who knew the defendant and who allegedly corroborated the fact that he was usually dressed as the victim described him, which conversations the defense was prepared to show never occurred. Both of the above constitutional issues were material to the finding of probable cause for issuing the search warrant; and both issues, if ruled on favorably to the defendant, could possibly result in the suppression of evidence found at the defendant's house. The United States Supreme Court reversed the conviction and ordered that a hearing by the Delaware trial court was necessary to determine the validity of the defendant's claims; that the defendant did provide a substantial basis for challenging the truthfulness and veracity of the affiant. Most important in the Supreme Court's consideration, was the fact that the defendant's own residence had been searched.

In this case, only one statement was shown by the State (not defense) to be false, and that statement was not material to the issuance of the warrant because both defendants had always been implicated by Ferritto. There was absolutely no evidence that anyone (except the defendants) knew Ferritto had lied on that point.

The court properly denied a suppression hearing because the defendants failed to show how their rights were infringed on, and, regardless of whether or not a hearing is ordered, as long as the facts show the lie did not materially affect the warrant and that the lie was used knowingly and recklessly, the warrants are valid.

Further, there is no evidence that Ferritto's one lie, if excluded from the affidavit, would have resulted in a lack of probable cause. The affidavit is 27 pages long and contains an abundance of probable cause upon which the warrant is based.

The facts show that there was no deliberate use of false information by Agent Kahoe, nor that the lie materially affects the validity of the warrant, and, absent those two showings, the warrants are valid. (See also, *State v. Dodson,* 43 Ohio App. 2d 31 (1974).)

For the above reasons, but especially because the defendants have failed to show or allege how their rights were violated, the State contends the trial court acted properly in denying suppression hearings where the defendants failed to establish standing to object.

**4. WHERE A DEFENDANT FAILS TO ESTABLISH A RIGHT TO PRIVACY IN THE AREA SEARCHED, HE LACKS STANDING TO OBJECT TO THE SEARCH AND HAS NO RIGHT TO CHALLENGE THE LEGALITY OF THE SEARCH AS IT RELATES TO HIM.**

Before any consideration of the constitutionality of any search warrant issued by the Federal Court can be entertained it must first be alleged and proven by the defendants that their personal Fourth Amendment right to privacy was infringed on, and that the infringement resulted in the admission of evidence that materially and substantially affected their right to a fair trial. Absent the defendants' showing they have a right to object—standing—any search warrant used by the State or Federal Government is not subject to challenge by these defendants, nor is the evidence gotten by such warrant subject to challenge on the basis that the warrant is unconstitutional.

In regard to the search of Apt. 333, Winchester Hills Apartments, the facts show that the apartment was leased by Zolton Kalman (a fugitive the State and Federal authorities are still looking for). (See St. Ex. 137-A,

a rent receipt for Apt. 333 Re: Zolton Kalman, R. 5020, Vol. 13.) There is absolutely no evidence whatsoever that shows either defendant owned, leased or used that apartment (other than when they met there the day before they killed Greene); there is not even an allegation by either defendant that they had or expected a right to privacy in Apt. 333. The mere fact that the defendants met there one day to plan the murder of another human being does not give them any right to privacy in that apartment.

The defendants, having filed motions to suppress, each had the burden of establishing that his own Fourth Amendment rights were violated by the use of the search warrant and seizure of evidence. *Simmons v. U. S.*, 390 U.S. 377, 389-390, 19 L. Ed. 2d 1247, 88 S. Ct. 967 (1968). "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be asserted vicariously." *Alderman v. U. S.*, 165 U.S. 174, 22 L. Ed. 2d 176, 89 S. Ct. 961 (1969). "A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed." *Rakas v. Illinois*, 58 L. Ed. 2d 387 at 395, 435 U.S. 922 (1978). Also, *U. S. v. Jones*, 362 U.S. 257, 261 (1960). (The United States Supreme Court's discussion of standing and right to object to a search warrant in *Rakas v. Illinois, supra,* is most recent and definitive law on those issues. By that case most of the law cited by the defendants has been overruled.)

> "And since the exclusionary rule is an attempt to effectuate the guarantees of the Fourth Amendment, *United States v. Calandra*, 414 U.S. 338, 347, 38 L. Ed. 2d 561, 94 S. Ct. 613, 66 Ohio Op. 2d 320 (1974), it is proper to permit only defendants whose Fourth Amend-

ment rights have been violated to benefit from the rule's protections. See *Simmons v. United States, supra,* at 389, 19 L. Ed. 2d 1247, 88 S. Ct. 967." *Rakas v. Illinois, supra* at 395.

This law also applies to the search of 919 Rondel. The apartment at 919 Rondel was rented by Donald Ready (R. 8338, Vol. 22). Neither defendant ever established an interest in or a right to privacy in that apartment. In fact, a review of Donald Ready's testimony (R. 8338, Vol. 22), shows that Ready claimed to be the owner of the evidence introduced by the State. (Donald Ready was convicted of perjury based on his testimony in the Greene case, on March 2, 1979, for his attempt to create an alibi for defendant Cisternino.)

The trial court properly denied the defendants' standing to object to the searches because the evidence shows that neither defendant ever substantiated his allegation of standing. A mere claim to have standing is not sufficient to gain standing. The defendants had the burden of showing the court some facts that supported their claim of protected privacy in the areas searched. The defendants did not even take the witness stand during the motion hearings to show they had some factual claim to object. Their entire motion was based on allegations by their attorneys.

The evidence seized from Rondel corroborated Ferritto's testimony and the State's contention that Cisternino had the capability to monitor F.B.I. and local police department radio transmissions in order to monitor and trace law enforcement activity with regard to the Greene bombing. Further, the key found in 919 Rondel was to Room 247 in a Holiday Inn occupied by Ferritto while he and the defendants were plotting to kill Greene.

The reference to the 919 Rondel apartment by Ferritto was the most current information the F.B.I. had in regard to that location. The reason it took until February 6, 1978, is because Ferritto did not remember the address, he only remembered the general location (near Kipling Avenue) and the house description. Because of that and severe winter weather conditions, it took the F.B.I. longer than expected to locate the house.

The defendants allege that the information was too "stale" to constitute probable cause. The very nature of case law demands that each case and its facts be considered separately. In this case a co-conspirator in a murder was apprehended and agreed to testify months after the planning and execution of the crime. Certainly as part of a thorough investigation the law enforcement community was obliged to investigate every possible source of information, and would be remiss if it failed to search one of the residences wherein the co-conspirators met to plan the killing regardless how long a time gap existed between the meetings and the discovery of the information.

*U. S. v. Rosenberger,* 536 F.2d 715 (1976), is supportive of the State's position. At page 719 the Court said:

> "Although it is clear that probable cause existing at some time in the past will not suffice for the issuance of a search warrant, circumstances may be established from which it may be inferred that grounds for the search continued to the time the affidavit was filed. See *Sgro v. United States,* 287 U.S. 206, 53 S. Ct. 138, 77 L. Ed. 260 (1932)."

The circumstances that permit the inference of probable cause to exist include the fact that the items searched for were not contraband of the type one would expect to

be destroyed, moved or altered. Further, 919 Rondel was more of a "hideout" than a residence, and as such the defendants did not expect the police to find the apartment.

The law cited by the defendants and by the State supports the contention that the passage of time alone does not cause facts to become "stale" to the extent they cannot be used to support probable cause.

In summary, the facts and law show that the defendants had no standing to object to the searches; that the evidence secured by the searches was relevant to the State's charge of aggravated murder and theory of conspiracy; that per Issue I the affiant did not knowingly and/or recklessly use false information; that, relative to the issues and facts in this case, the affidavit did contain timely information and that the information was acted on timely; that any evidence not relevant to the issues was excluded by the court without any harm to the defendants; and finally, the court did not err in denying standing to the defendants to challenge the validity of the search warrants because the defendants never established a right to claim standing.

## 5. A PROSECUTOR'S CLOSING ARGUMENT SHOULD BE CONSIDERED IN LIGHT OF THE NATURE OF THE CASE, THE FACTS PRESENTED DURING TRIAL, AND THE STRENGTH OF THE STATE'S CASE.

The State's case was overwhelming. Two of the conspirators testified that each defendant participated in the murder conspiracy; two private citizens identified Ferritto as the driver of the get-away car, and one identified Carabbia as being with Ferritto; finally, there was con-

siderable circumstantial and corroborative evidence that supported the testimony of the State's main witnesses.

Taking into consideration the nature of the case, and the considerable strength of the State's facts, the prosecutor's closing remarks did not deprive the defendants of a fair trial.

The State suggests that the question of law on this subject offered by the defendants is a grossly exaggerated principle. It is speculative, at least, to suggest that a jury was prejudiced by an attorney's closing comments, especially considering the jurors' oath, and the admonitions and law given by the Court. The State has been unable to find any State or Federal case wherein a juror claims to have been swayed or prejudiced by an attorney's comments. Case law that permits a defendant to raise such an issue has been excessively raised without any basis in fact to support such a contention.

These defendants ask that they be given a new trial because they claim they were denied a fair trial due to the prejudicial remarks of the prosecutor. If this is so, where is the evidence that the jurors were prejudiced? It is fast becoming apparent that this type of issue is the last resort of a defendant who can find no viable issue to raise on appeal.

The State contends that because of the strength of the State's case, the overwhelming evidence that convicted each defendant, and the fact that all allegations by the defendants are taken out of context, there was no reversible error committed by the State.

## CONCLUSION

The defendants have failed to raise any issue of great public interest, or any substantial constitutional issue not already properly decided by the Ohio Appellate Ccurts.

The State respectfully requests that this Supreme Court deny the defendants' Petition for Writ of Certiorari.

Respectfully submitted,

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No. 80-1397

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# In the Supreme Court of the United States

**October Term, 1980**

RONALD CARABBIA,

and,

PASQUALE CISTERNINO,

*Petitioners,*

vs.

STATE OF OHIO,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE EIGHTH DISTRICT COURT OF APPEALS
FOR CUYAHOGA COUNTY, OHIO

## REPLY BRIEF OF PETITIONERS


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No. 80-1397

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## REPLY BRIEF OF PETITIONERS

Were it not for the seriousness of this case, the temptation to simply let the sophomoric flaws in the State's arguments fall under their own weight without comment would prevail. On the other hand, even though truly convinced there is no possible way this Court will be persuaded to adopt any of respondent's arguments, a Reply directed to only two of the issues in this cause is being offered.

Condensed, the most critical issues in this case involve the identification testimony of Debbie Spoth *and* the egregious and reprehensible summation made by the chief trial prosecutor. As to the former, apart from the fact that the photographic array used was slanted against Ronald Carabbia, and apart from even the fact that the identifica-

tion witness, Debbie Spoth, had previously passed over Ronald Carabbia's picture *many* times without even saying he resembled the suspect:

> "When he [the prosecutor] showed . . . [the photos of the *indicted* defendants to] her on February 16th, she looked at them, picked up Cisternino's, said 'That's the one the papers say did it, but that's not right. This man [*i.e.*, Ronald Carabbia] is more like him, but I've got to see him in person'." (A123.)

As to the scurrilous summation made by the prosecutor during the course of which he called defense counsel liars and stated they believed their clients were guilty, proof that these things happened should, without more, suffice to inspire this Court to make it perfectly clear that there are still limits beyond which no prosecutor may go in his quest for victory or personal glory.

## I.

Dealing first with petitioners' contention that the eyewitness identification testimony was manipulated by the prosecutor, respondent states that "prosecutor Marino showed each witness separately a nine photograph array of the defendants." And, according to respondent, what "Debbie Spoth said [was] Carabbia's picture looked like the man in the rear of the car, but she would have to see him in person to be sure" (*Respondent's Brief*, p. 14). Ultimately, the State argues that because Debbie Spoth identified Carabbia at the trial and her husband did not, such was proof the procedure utilized was not suggestive (*id.*, at 16).

What counsel obviously fails to comprehend about our complaint is that, *given* the description supplied by the Spoths as fitting to varying degrees the man in whose place Carabbia was convicted, the State cannot justify (1) the

prosecutor submitting to the jury *only* pictures of the *defendants,* and (2) the prosecutor making himself the *sole* witness as to the various things that were said and done during this most critical confrontation.

The petitioner Carabbia has thus contended he was mistakenly identified by Debbie Spoth. Further, the contention is made that Ferritto's identification of Ronald Carabbia resulted from the fact that in preference to losing his deal with the State and Federal authorities, he simply agreed with Aratari (at the insistence of the agents) that Carabbia was in the car. Consistent with this position, it is here maintained that the witness Aratari's identification of Ronald Carabbia was likewise willfully inspired by the FBI agents in this case. Here, the facts show that even before Aratari told the agents Cisternino was not in the car with Ferritto, the agents realized the potential testimony by the Spoths that Cisternio was not in the car with Ferritto put their case in serious jeopardy unless other evidence could be *created.*

Thus, we contend that Aratari was manipulated into identifying a picture of Ronald Carabbia whose name had not been previously supplied by Aratari to his FBI interrogators as the person present on scene with him and at other places during the transpiration of events testified to by him. However, once Aratari picked Ronald Carabbia's picture, it was not even a mean feat to persuade Ferritto to change his story on this point to conform with Aratari's statement that it was Ronald Carabbia and not Cisternino. Relevant here is Ferritto's testimony that there was no lie he would not tell if he felt he could get away with it *and* it was in his interest to tell such a lie. Indeed, Ferritto virtually admitted that, in agreeing with Aratari, he had simply taken the path of least resistance. Here, the Record shows the following testimony by Ferritto:

By Mr. Willis:

Q. They came to you with a version which they believed was more credible because nobody's record could be worse than yours, and said we now believe that Carabbia was in the back seat of that car.

A. Yes, sir.

Q. Right? So, the path of least resistance was to go along with them, rather than—and if I'm wrong, you straighten me out—stick to your original story?

A. Yes, sir.

Q. Yes. But if you had continued to insist that Cisternino was in the back seat of that car, you knew the consequences were grave, didn't you?

* * * * *

A. There was a chance that I might not have gotten that deal, yes, sir.

Q. All right. Then we can understand that when these agents came to you, you talked about the status of your deal?

A. Yes. Somewhat.

Q. And you talked about the status of your deal before you made your new statements? We are waiting, Mr. Ferritto.

A. Yes, sir. Yes, sir.

Q. Yes. And you [had] talked about the deal before you put Cisternino in the back seat of that car, didn't you?

A. Yes, sir.

* * * * *

Q. All right. Then when it comes right down to the bottom line, the bottom line is that all of the

testimony that you have given in this case is in exchange for your deal?

A. Yes, sir.

Q. Right. Now, that's still another way of saying that the government bought and paid for your testimony with the consideration involved in the deal made with you.

A. Yes, sir, if you want to put it that way. Yes, sir.

All this makes it clear that the most critical testimony against Ronald Carabbia was the identification evidence provided by Debbie Spoth. It is here too that the specious and shallow arguments made in the State's brief actually reveal support for our thesis as outlined above. Here, we refer to the prosecutor's concession that "after Aratari was arrested and confessed, Ferritto was confronted with Aratari's statement and he admitted the lie." That said, we are then told "[1] The reason Prosecutor Marino could not state his reasons for suspecting that Carabbia was in the rear seat was because there was no substantive basis for believing that Ferritto lied. [2] The only conflict at that time was the Spoths' tentative identification of Carabbia's photo. [3] Only when Aratari was arrested was the State able to prove Ferritto lied by the use of Aratari's statement and Ferritto's admission that he lied" (*Id.*, at 17).

Our thesis is further augmented by the fact that Debbie Spoth, who had passed over Ronald Carabbia's picture on several occasions before she selected his picture from those shown her on February 16 as most resembling the suspect,[1] only testified when first asked in court that

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1. Debbie Spoth also admitted to having seen Ronald Carabbia's picture in the newspaper and on television.

she was "almost positive" (R 3276). Contrast this with the fact that when originally asked if she could identify the occupants of the car, her unequivocal response was "driver, yes" (R 3523-3524).

This then brings us to grips with the fact that Debbie Spoth was only shown, at this point, pictures of those under indictment in this case which made it quite predictable that she would pick Ronald Carabbia's picture as coming closest to the suspect. Since all of these photos, with the single exception of Ronald Carabbia's, were readily excludable for the obvious reason of the apparent ages of the parties involved, it tends to follow that the array was purposely slanted against Ronald Carabbia. (If not this then the hope had to be that the Spoths would agree with Ferritto that it was Cisternino.)

For our part, it is at least intellectually dishonest to assure this Court, as our prosecutor does, that before Debbie Spoth made her tentative identification of Ronald Carabbia "the State, FBI, ATF, Lyndhurst Police, and Cleveland police were *fully* convinced that Cisternino was in the rear seat of the car driven by Ferritto," which assurance was coupled with the indication that, at the time, the "State had no idea that anyone other than Cisternino was in the rear seat" (*id.*, at 15).

Stated another way, how can this prosecutor argue to this Court, in one breath, that the State[2] "fully" believed Cisternino was in the car when those photos were shown Debbie Spoth (*ibid.*) and, in another, say he suspected all along Ronald Carabbia was in the back but simply had no substantive basis for believing Ferritto had lied (*id.*, at 17).

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2. Any doubt that Carmen Marino was included with others having this belief is verified by his further statment that "furthermore, on February 16th, the prosecutors and all the law enforcement officers connected with the case believed Cisternino was in the back seat" (Respondent's Brief, p. 16).

Distilled, more emerges here than the mere fact that Debbie Spoth's virtual insistence that Cisternino was *not* in the car seriously imperiled the State's case based, as it then was, in total reliance on Ferritto's version. The arrest of Aratari, whose vulnerability to suggestive interrogation (and his instinct for self-preservation), presented only the relatively easy task of convincing him the FBI believed Ronald Carabbia was in the car. This accomplished, the rest was easy.

Also, of no mean significance here, this Court should note that in the State's arguments in response to the identification issues are supported solely by the eloquence of counsel. In the course of what comes off as ravings, we are told any question raised as to the identification evidence in this case (which included whether the procedure used was conducive to irreparable misidentification) were "matters of fact on the jury to decide" (*id.*, at 17). And, we are told that the "trial court has no right or jurisdiction to decide matters of fact" (*ibid.*).

For our part, only one who has not read the controlling cases in this area would have made such an argument. However, the fact that such an argument was made shows what we have had to deal with in this case in trying to have our arguments properly evaluated.

Stated another way, the fact that the State does not cite a single case as support for *any* of the positions taken by it in this segment of its Brief exposes a basic lack of comprehension of the issues here involved. This assailment includes the statement that "no special instruction was necessary because there was never any mistaken identification" (*id.*, at 16). If counsel had understood the contention, he would have realized Carabbia was contending he was mistakenly identified by Debbie Spoth, not by her husband.

## II.

The prosecutor's defense of the jury argument made by him borders on the ridiculous, for rather than defend against the categorical charge made in the petition that his conduct in making this particular summation was *unprofessional* and *unethical* in the extreme, the "cop out" response made is that it has never been proven any juror was "swayed or prejudiced by an attorney's comments" (*id.*, at 32). In addition, the asinine assertion is made to the effect that those cases holding such could possibly have occurred therein were decided "without any basis in fact to support such a contention" (*ibid.*).

Obviously then, according to this prosecutor who credits the Court with having "properly ruled [over defense objections] that Greene's relationship with the FBI was totally irrelevant" (*id.*, at 20), it was perfectly alright for him to argue to the jury as follows:

> Mr. Marino: The one concession we [that is, the State] made to the FBI is that we would not have them take the stand and publically acknowledge that a certain individual—
>
> Mr. Yelsky: Objection.
>
> Mr. Willis: There is no evidence as to that.
>
> Mr. Marino: (Continuing)—was an informant.

(*Petitioners' Appendices*, p. A103.)

Even this is not all, if counsel opposite is correct, it is not even possible that these petitioners were prejudiced by his imploration to the jury to convict because "every law enforcement agency connected with this case [*i.e.*, the F.B.I., A.T.F., U.S. Marshall's Service, the Cleveland Police, the Lyndhurst Police and others] knows without any doubt" that those being tried are guilty (*id.*, at

A127). Further, according to this prosecutor, because there is no evidence that the jurors were prejudiced, any argument that they were is invalid (*Respondent's Brief*, p. 32).

In any event, we have the prosecutor's word that "all the allegations [of abusive arguments as made] by the defendants are taken out of context" (*ibid.*). For our part, the various segments of the prosecutor's argument centralized in our petition were not "a few brief sentences in the prosecutor's long and expectantly hortatory closing argument," *Donnelly v. DeChristoforo*, 416 U.S. 627, 647 (1974). Rather these remarks were exemplary of the unparalleled "fire and brimstone" character of an argument that can only be properly labeled as being "almost unheard of in its latitude of vituperation and bitterness," *Lonardo v. Ohio*, 34 Ohio Law Rept. 434 (1931). It follows that this form of prosecutorial misconduct *actually* permeated the entire closing arguments as well as the trial itself.

Hopefully too, this Court will credit our assailment of the prosecutor's summation, in which he committed wrongs of every possible type, as having been sincerely made in hopes of rectification. For, if the arguments made by this prosecutor to the jury, and in defense thereof to this Court, are valid; then it may as well be said there is nothing that can possibly be said by any prosecutor during his summation that would warrant the granting of a new trial.

## CONCLUSION

The cogency of the arguments made herein make it clear these petitioners will ultimately be given a new trial. Hopefully, it will be one in which the prosecutor not only evidences that he knows the rules but displays that he possesses that instinct of fairness that gives him the desire to respect them.

Respectfully submitted,

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